Petition

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NO. _____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1980

CARLSON MOORING SERVICE

AND

HOUSTON GENERAL INSURANCE COMPANY,

Petitioners

V.

WILSON P. LANDRY

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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* * * *

Petitioners, Carlson Mooring Service and Houston General Insurance Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 27, 1981, with rehearing and rehearing en banc denied

on May 28, 1981.

QUESTIONS PRESENTED

1. Whether the Court of Appeals incorrectly applied Thomas v. Washington Gas Light Company, ___ U.S. ___, 100 S.Ct. 2647 (1980), to deprive Petitioners of their defenses of res judicata and full faith and credit?

2. Whether Wilson P. Landry is foreclosed by equitable estoppel from a supplemental recovery of compensation?

3. If the Court of Appeals did correctly interpret Thomas, should Thomas be applied prospectively only?

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OPINION BELOW

Respondent, Wilson P. Landry, petitioned the Court of Appeals for review of the decision of the United States Department of Labor's Benefits Review Board, 9 B.R.B.S. 518 (1978), denying compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901 et seq. The Director, OWCP, filed a review petition in support of Landry.

The parties completed the filing of briefs and reply briefs to the Court of Appeals in July, 1979. The cause was argued to a panel of the Court of Appeals on June 10, 1980. Thereafter, the parties submitted supplemental briefs directed to issues that had been awaiting decision by this Court when the case was argued. See Thomas v. Washington Gas Light Company, ___ U.S. ___, 100 S.Ct. 2647 (1980), and Sun Ship, Inc. v. Commonwealth Of Pennsylvania, ___ U.S. ___, 100 S.Ct. 2432 (1980). By an opinion dated April 27, 1981, reported in 643 F.2d 1080, the Court of Appeals reversed the Benefits Review Board's decision in this case and remanded to the Board for further proceedings.

The Court of Appeals held that this Court's judgment in Thomas has invalidated Petitioners' pleas of res judicata and full faith and credit. The court also held that Landry's pursuit

of his Texas workers' compensation remedy to final judgment had not worked an election and that Petitioner carrier, though entitled to credit for sums paid directly to Landry, is not entitled to credit against a supplemental LHWCA award for the portion of the Texas judgment proceeds that went to compensate Landry's attorney. Although by supplemental brief following this Court's Thomas decision, Petitioners presented the argument that Thomas, should it be found in point, ought not be applied retroactively, the Court of Appeals did not directly address this issue. It was again presented to the Court of Appeals by petitions for rehearing and rehearing en banc, which were denied. By order dated June 19, 1981, the Court of Appeals denied Petitioners' motion for stay of the mandate.

JURISDICTION

The opinion of the Court of Appeals was entered on April 27, 1981. A timely petition for rehearing and suggestion for rehearing en banc were denied on May 28, 1981. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION
ARTICLE IV - STATES - RECIPROCAL RELATIONSHIPS BETWEEN STATES AND WITH UNITED STATES

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

* * * *

TITLE 28 UNITED STATES CODE, Sec. 1738:

State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

* * * *

TEX. REV. CIV. STAT. ANN.,
Article 8306, Secs. 3 and 19;
Article 8307, Sec. 5

[Reproduced at Appendix E]

STATEMENT OF THE CASE

Wilson F. Landry's work consisted of tying up ships as they docked near Port Arthur, Texas. In February, 1974, Landry sustained a heart attack after returning home from work. Having employed an attorney, Landry initially filed compensation claims under the Texas Workers' Compensation Law, Tex. Rev. Civ. Stat. Ann., Art. 8306 et seq, and the LHWCA.

The Texas Industrial Accident Board sustained Petitioners' plea of exclusive LHWCA jurisdiction and dismissed the State claim. Rather than proceed with his LHWCA claim, Landry then filed a lawsuit in the District Court of Jefferson County, Texas, to set aside the IAB's decision and recover Texas compensation. Petitioners again answered with a plea of exclusive federal jurisdiction, but the State court overruled the plea and set the case for trial.

The parties then settled the Texas lawsuit by court-approved final judgment awarding Landry the lump sum of $20,000.00 in full settlement and satisfaction of all claims and causes of action " . . . on account of personal injuries sustained by plaintiff . . . ," of which $5,000.00 was awarded to Landry's attorney. Petitioner carrier paid and discharged the settlement; Landry executed a general release of all claims "state or federal;" and Landry promptly withdrew his

LHWCA claim. These events occurred in 1975.

Landry did not try to appeal the final State court judgment or seek to set it aside for fraud, mistake, accident or other cognizable reason, nor did he indicate any dissatisfaction therewith. After employing new attorneys, however, Landry reopened his LHWCA claim, alleging entitlement to compensation for total and permanent disability due to the same heart attack. The OWCP's Administrative Law Judge awarded LHWCA compensation, but the Benefits Review Board reversed. Landry petitioned for review, and the Court of Appeals' reversal of the Board followed. Petitioners now submit this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Incorrectly Applied Thomas to Deprive Petitioners of Their Defenses of Res Judicata and Full Faith and Credit.

A. Neither Thomas nor McCartin Requires a Reversal of the Benefits Review Board's Decision.

On June 27, 1980, this Honorable Court handed down Thomas v. Washington Gas Light Company, supra, whose precedential impact the Court of Appeals felt bound to observe. In Thomas the parties had entered into an "Industrial Commission of Virginia Memorandum of Agreement as to

Payment of Compensation," which the Virginia Industrial Commission approved "during incapacity." Unlike this case, no lawsuit or appeal was taken by either party to contest the administrative action. The claimant thereafter sought supplemental compensation for the same injury under the District of Columbia workers' compensation law, which law is the LHWCA by adoption. This court held that the claimant was not barred by full faith and credit from recovering under the LHWCA.

At Page 1085 and footnote 2 of the Court of Appeals' opinion in this case, the court validly distinguished the four-Justice plurality opinion in Thomas. However, making an "educated guess" with which it was "not at all comfortable," id. at n. 3, the court adopted, for purposes of this Texas case, the analysis of this Court's three concurring Justices. Whereas the Thomas plurality would have elected not to follow either Magnolia Petroleum Company v. Hunt, 320 U.S. 430 (1943), or Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622 (1947), the three concurring Justices would have left Magnolia standing as "the sounder doctrine," ___ U.S. at ___, 100 S.Ct. at 2665, but would have followed McCartin on the facts there presented because Virginia's compensation statute lacked "unmistakable" language precluding subsequent recovery in

another jurisdiction. Two Justices dissented in Thomas and would have overruled McCartin while preserving Magnolia.

Petitioners respectfully submit that the Court of Appeals erred in positing that a majority of the Justices of this Honorable Court would adopt the rationale of Thomas's three concurring Justices on the facts of this Texas case. Although the Court of Appeals identified the Thomas concurrence as the only possible common ground for decision, and thereupon concluded that Texas law, too, lacks the necessary McCartinesque "unmistakable language," the portion of Thomas that is quoted by the Court of Appeals in support of this conclusion comes from the plurality opinion, ___ U.S. at ___, 100 S.Ct. at 2657-58 n. 21, not from the three-Justice concurrence. See 643 F.2d at 1085-86.

Petitioners respectfully submit that the Thomas concurrence nowhere adopts, endorses or approves footnote 21 of the plurality opinion. The Thomas concurrence explicitly does endorse and would keep Magnolia. The two dissenting Justices also would preserve Magnolia. No Texas statute or issue of Texas law was before this Court in Thomas. Accordingly, the plurality's footnote 21 and, particularly, the comments therein concerning Magnolia's construction of Section 19 of The Texas Workers' Compensation Law and the Texas Legislature's intent behind Section 19 must be viewed

as gratuitous dicta, and Thomas contains no evidence that a majority of the Justices of this Court would follow the plurality's footnote 21 in this Texas case, as the Court of Appeals has done.

Petitioners respectfully submit that neither McCartin nor Thomas overruled the holding of Magnolia and that Magnolia remains the correct precedent interpretive of the operation of the Texas Workers' Compensation Act and the doctrine of full faith and credit, and that Magnolia, McCartin and Thomas all require the granting of this Petition and reversal of the judgment of the Court of Appeals.

By the time this case was argued in the Court of Appeals, Magnolia had been on the books for 37 years as the ruling statement of this Court concerning the law of res judicata and full faith and credit applicable to final workers' compensation awards from Texas. McCartin expressly did not modify Magnolia but carefully distinguished it. 330 U.S. at 629-30. Magnolia had, necessarily, authoritatively interpreted the Texas workers' compensation law. Its interpretation was surely in accord with what the Texas Legislature always intended, because the Texas statutes have not been amended in any material respect since Magnolia. The Texas law, Tex. Rev. Civ. Stat. Ann., Art. 8307, Sec. 5, explicitly states that

the first award or judgment "shall be res judicata." This language is "unmistakable." Further, Magnolia's longstanding interpretation of the Texas law is, in every functional and practical sense, unmistakably preclusive.

In Magnolia this Court took express notice of two particular provisions of Texas compensation law. Then and now, Art. 8306, Sec. 3, has provided in applicable part that the employees of a subscriber to the workers' compensation insurance program "shall have no right of action against their employer . . . for damages for personal injuries . . . but such employees . . . shall look for compensation solely to the [insurance carrier]." This provision is commonly known as the "exclusivity" provision of the Texas law. The Magnolia Court also gave effect to Art. 8306, Sec. 19, which, then and now has presented the following pertinent language: "[N]o recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the state where such injury occurred."

The Magnolia Court found implicitly that the Texas Legislature, by enacting Sec. 19, intended not only to establish an obvious bar against a second recovery under the Texas compensation law following recovery under the law of another

state where the injury occurred, but also to preclude any further recovery of compensation after the employee "has elected to pursue his remedy and recovers in the state where such injury occurred," which, equally obviously, could be Texas, as in fact was the case in Magnolia.

So understood, Magnolia retains its vitality and is not inconsistent with or mitigated by McCartin, which involved construction of an entirely different compensation statute and legislative intent -- that of the State of Illinois. That the Magnolia construction and application of the Texas Workers' Compensation Act remain correct today is amply demonstrated by the fact that, since Magnolia was decided, the Texas Legislature has had 38 years in which to repeal or modify the applicable portions of Sections 3 and 19, but has never done so. Under these circumstances even McCartin's dictum calling for "unmistakable language by a state legislature or judiciary," 330 U.S. at 628, is satisfied, without regard to the fact that McCartin also turned on an express reservation of rights contained in the release executed by the claimant -- a reservation nowhere present in Magnolia or in this case -- indeed, expressly negated by a general release given by Respondent Landry in this case.

The Court of Appeals, however, found that "there is no stated intent to make an award under Texas law conclusive of litigant's rights under the law of another jurisdiction," qua McCartin. 643 F.2d at 1086. Petitioners respectfully submit that the Court of Appeals, in a conscientious effort to decipher the teaching of this Court in Thomas, elevated form over substance. The Court of Appeals gave insufficient weight to the fact that Magnolia was a Texas case while McCartin and Thomas were not. Although the Court of Appeals would follow the three-Justice concurrence from Thomas, there is no indication in Thomas that the three concurring Justices would approach the circumstances of this case as they did the Virginia law, nor, especially, that any of the plurality Justices would exhume McCartin's remains for purposes of this Texas case.

Respectfully, the Court of Appeals by speculation has reached the wrong result on the issues of res judicata and full faith and credit. Thomas does not decide this case, but Thomas does tell us that five sitting Justices would preserve Magnolia. (Chief Justice Burger and Justices White, Marshall, Powell and Rehnquist).

B. The Judgment of the Texas Court is a "Final Judgment" Entitled to Res Judicata Effect and Full Faith and Credit.

In Thomas, the four-Justice plurality emphasized that the Virginia compensation award was made by an administrative board rather than by a court. ___ U.S. at ___, 100 S.Ct. at 2661. Petitioners respectfully submit that a majority of the Thomas Court discredits this distinction and that, even if this distinction has validity, it is not applicable here.

In Magnolia the Texas Industrial Accident Board's award of compensation became final only because the claimant did not file suit to have the award set aside within the time prescribed by the Texas law. The Louisiana courts found that the Texas award had force and effect in Texas comparable to that of a final judgment by a court of competent jurisdiction, and to that extent would be held res judicata in Texas. From this premise the Magnolia Court held that the Texas award was entitled to full faith and credit.

In this case the Texas award resulted from a court-approved compromise and settlement of Landry's compensation lawsuit. The settlement was reduced to a final judgment,

which, though negotiated rather than fully litigated, became conclusive and binding on both parties under Texas law as res judicata. See Texas Employers Insurance Association v. Morgan, 295 S.W. 588 (Tex. Comm. App. 1927, opinion adopted); Estes v. Hartford Accident & Indemnity Co., 46 S.W.2d 413, 416 (Tex.Civ.App. -- El Paso 1932, writ refused); Indemnity Insurance Co. of North America v. Hare, 107 S.W.2d 739, 741 (Tex.Civ.App. -- Beaumont 1937, writ refused); Traders & General Insurance Co. v. Bailey, 94 S.W.2d 134, 135 (Tex. Comm. App. 1936, opinion adopted); Pacific Employers Insurance Co. v. Brannon, 242 S.W.2d 185, 191 (Tex. 1951); Esco v. Argonaut Insurance Co., 405 S.W.2d 860, 863 (Tex. Civ.App. -- Beaumont 1966, writ refused n.r.e.); Moore v. Lumbermen's Mutual Casualty Co., 533 S.W.2d 171, 173 (Tex.Civ.App. -- Amarillo 1976, writ refused n.r.e.).

Thus, in this case any "critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority," Thomas, supra, ___ U.S. at ___, 100 S.Ct. at 2661 (Plurality Opinion), were rendered immaterial by Landry's commencement of, and the parties' full settlement of, the State court lawsuit. Petitioner carrier paid off and discharged its entire obligation. There can be no

serious question that the Texas court's judgment is "final" for purposes of res judicata and the federal full faith and credit statute, 28 U.S.C. Sec. 1738.

In summary, Petitioners respectfully submit that the Court of Appeals erred in holding that Respondent Landry's pursuit of supplemental compensation under the LHWCA for the same injury is not barred by full faith and credit. Neither McCartin nor Thomas dictates the outcome of this case. Although Landry's present claim is based on the LHWCA rather than another State's workers' compensation law, no paramount federal interest -- e.g., that Landry's release was ineffective under 33 U.S.C. Sec. 915(b) -- disentitles Petitioners to their federal full faith and credit defense. The LHWCA, as amended in 1972, does not preempt State compensation programs. Sun Ship, supra. Williams v. North Carolina, 317 U.S. 287, 303 (1942), holds that a judgment is entitled to full faith and credit even though the law upon which it was based need not be applied in another jurisdiction due to a fundamental conflict in public policy. Neither Thomas nor Sun Ship has weakened this rule, under which Petitioners are entitled to prevail.

II.

The Claimant is Foreclosed by Equitable Estoppel from a Supplemental Recovery of Compensation.

Although the Court of Appeals rejected Petitioners' election of remedies defense, 643 F.2d at 1087-88, the court did not address Petitioners' additional argument that this particular claimant, by his own calculated choice, is estopped from LHWCA recovery. Yet if ever there were a case in which justice would be disserved by relieving a party from his solemn judicial bargain, this is it. This Court did not indicate in either of its recent decisions in Thomas or Sun Ship that estoppel could not be raised as a defense in a proper case. In fact, the concurrence in Thomas noted that:

> It seems . . . grossly unfair that the plaintiff, having the initial choice of forum, should be given the additional advantage of a second adjudication should his choice prove disappointing. Defendants, on the other hand, would no longer be assured that the judgment of the first forum is conclusive as to their obligations, and would face the prospect of burdensome and multiple litigation based on the same operative facts. Such litigation would also prove a strain on an already overworked judicial system. ___ U.S. at ___, 100 S.Ct. at 2664-65.

Estoppel is ripe for application here. Today "law" and "equity" are merged, and when this Court adjudicates, it exercises both types of powers. The LHWCA is not the only piece of federal legislation on the books that implements important national goals. The federal civil rights legislation at issue in Albemarle Paper Company v. Moody, 422 U.S. 405

(1975), reflects national goals of highest priority -- the eradication of employment discrimination. Like the LHWCA, Title VII admitted of no answer to a claimant's inequitable procedural conduct. Yet this Court did not hesitate to hold that "a party may not be 'entitled' to relief if its conduct of the cause has improperly and substantially prejudiced the other party." 422 U.S. at 424. The circumstances of this case are considerably more compelling because here, unlike Albemarle, Petitioner carrier clearly incurred detrimental reliance on Landry's judicial representations. Difficult issues of liability (a heart attack at home) and compensability were settled without litigation. Injustice can be prevented only by enforcement of the bargain that Petitioner carrier honored in full but Respondent Landry now repudiates. "The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." Dickerson v. Colegrove, 100 U.S. 578, 580 (1880). Accordingly, Petitioners urge this Court to grant this Petition and reverse the judgment of the Court of Appeals since Landry is estopped from further recovery.

III.

Even if Thomas Was Correctly Applied by the Court of Appeals, It Should Only Be Applied Prospectively.

Assuming arguendo that the Court of Appeals correctly applied Thomas and that equitable estoppel does not preclude another recovery by Landry, Petitioners submit that this Court should grant this Petition and hold that it would be manifestly unjust, after at least 37 years of substantial reliance on Magnolia, to permit retroactive application of the Thomas result in this case.

In Magnolia this Court interpreted Section 19 of the Texas Workers' Compensation Act to mean that the legislature intended to preclude a supplemental award in another jurisdiction after the employee had recovered a final award in Texas against the same employer for the same injury. This must have been the Texas Legislature's intent because to this day the statute has not been changed in any material respect. McCartin, decided four years after Magnolia, and involving an Illinois compensation settlement, carefully distinguished and preserved Magnolia "since the Texas award had the degree of finality contemplated by the full faith and credit clause." 330 U.S. at 627.

Thus, at least until the time of the final judgment in this case, for which Landry freely accepted the benefits and withdrew his LHWCA claim, Petitioner carrier and others similarly situated in Texas had no reason to suspect that the controlling rules of res judicata and full faith and credit might be different from what Magnolia had established. Even if it were thought that some paramount federal policy might require a fresh analysis in the case of potentially overlapping State and LHWCA jurisdictions after the 1972 amendments to the LHWCA, no change in the rules was signaled until, at the earliest, the 1977 decision in Johnson v. Texas Employers' Insurance Association, 558 S.W.2d 47, 52 (Tex.Civ.App. — Beaumont 1977, writ refused n.r.e.)(dicta), whose actual holding of no federal preemption was not confirmed until this Court's 1980 decision in Sun Ship, supra.

Meanwhile, justifiably relying on Magnolia and similar cases, including the Fifth Circuit Court of Appeals' opinion in Shea v. Texas Employers' Insurance Association, 383 F.2d 16 (5th Cir. 1967), which was read as resting on both res judicata and election of remedies, Texas workers' compensation claimants and carriers concluded this case and countless others filed under the Texas law but potentially covered also by the

LHWCA by the payment of substantial sums. This was done in the wholly reasonable and authoritatively-supported expectation that the settlements and judgments, valid and final under Texas law, would be valid and final everywhere in the United States by virtue of full faith and credit. This expectation was surely reflected in the Texas workers' compensation insurance industry's evaluation of its risks and by the Texas State Board of Insurance in fixing the rates of premium that the carriers could charge Texas employers to cover their risks. See Tex. Ins. Code. Ann., Arts. 5.55, 5.60. In short, no one had reason to think that the carrier could be made to pay twice for the same injury.

But in this case the Court of Appeals' result retroactively devastates these legitimate expectations of finality and grants innumerable potential windfalls. In virtually every similar situation occurring since the 1972 LHWCA amendments, the claimant will now be able to open or reopen a stale LHWCA claim despite the finality of his State settlement or judgment. Lack of notice will rarely, if ever, defeat the claim because the employer or carrier necessarily knew of the injury or death at the time. See 33 U.S.C. Sec. 912(d). The carrier or employer <u>might</u> have a defense --

collateral estoppel -- only if the state claim was fully litigated to a final judgment adverse to the claimant. Thomas, supra, ___ U.S. at ___, 100 S.Ct. at 2661. This defense accordingly would not apply to settled cases -- even court-approved settlements as here.

At this time it is impossible to calculate precisely the additional, unanticipated economic exposure to which Petitioner carrier and others doing similar business are put by the Court of Appeals' retroactive application of Thomas. By every likelihood, however, it is enormous, as illustrated by Judge Keith's comments in Johnson v. Texas Employers' Insurance Association, supra:

> The benefits payable to the injured workman in Texas are much lower than those provided under the LHWCA.[8]
>
> 8. Compare 33 U.S.C.A., Sec. 906 (Supp. 1977) with Tex. Rev. Civ. Stat. Ann., Art. 8306, Sec. 29 (Supp. 1977), as amended by Texas Session Laws 1977, Ch. 470, at 1221.
>
> * * * *
>
> Having held that the employee may proceed under the State Act (to collect a maximum of $70 per week), I suggest that the majority has held that the insurance carrier of the employer has a concomitant right to proceed in that court and avoid paying plaintiff a maximum of $318.38 per week under LHWCA.[9]

* * * *

9. See 4 Larson, Workmen's Compensation Law, Sec. 89.27, P. 16-180 (1976).

* * * *

> The Texas Workers' Compensation Act is, basically, a single-shot claim or cause of action with little, if any administrative supervision. On the other hand, the Federal Act is virtually a cradle-to-grave act once an injury triggers its application. 558 S.W.2d at 55 (Concurring and Dissenting Opinion).

In this case the Court of Appeals found itself "bound by the precedential impact" of Thomas, 643 F.2d at 1084, to the extent that Thomas mandated reversal of the Benefits Review Board. Yet, if Thomas is disregarded momentarily, there can be no doubt that Petitioners justifiably relied on Magnolia as the controlling law and that a retroactive application of Thomas is extremely unjust.

In Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971), this Court succinctly summarized the pertinent considerations on the issue of retroactivity presented by this case:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., Hanover Shoe, Inc. v. United Shoe

> Machinery Corp., supra, 392 U.S., at 496, 88 S.Ct. at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see e.g., Allen v. State Board of Elections, supra, 393 U.S., at 572, 89 S.Ct., at 835. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation." Linkletter v. Walker, supra, 381 U.S., at 629, 85 S.Ct., at 1738. Finally, we have weighed the inequity posed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, supra, 395 U.S., at 706, 89 S.Ct., at 1900.

Proceeding with the Chevron Oil analysis, there can be no doubt that the Court of Appeals' application of Thomas, a Virginia case, to the Texas judgment in this case embodies a new rule of law under the doctrine of res judicata and 28 U.S.C. Sec. 1738. At least in the Texas context, Magnolia was, until the lower Court's adoption of the Thomas concurring opinion, clear precedent by the highest court in the land. And there can be no doubt about litigants' consistent reliance on Magnolia in this and in many other Texas-based cases over the past 30-plus years. While the Thomas plurality would have overruled Magnolia altogether by what the Court of Appeals accurately called "a substantial reevaluation of the doctrine of

full faith and credit," 643 F.2d at 1085, it is equally accurate to say that the Court of Appeals has held that a majority of this Court would find, for the first time and on the basis of three concurring Justices' reasoning, that Thomas has overruled Magnolia with respect to Texas because the Texas statute's language is not as "unmistakable" as McCartin, an Illinois-Wisconsin case, would require. Ironically, the Thomas four-Justice plurality would have discarded McCartin as well as Magnolia, ___ U.S. at ___, 100 S.Ct. at 2658-59, and thus it is difficult to discern why the Court of Appeals believed that a majority of this Court would follow the three concurring Justices in Thomas. But be that as it may, it is surely correct to conclude that Thomas meets the "new principle of law" prong of the Chevron Oil test as applied to Texas and this case.

Second, Chevron Oil requires consideration of the prior history of the rule in question, its purpose and effect, and whether retrospective application will advance or retard its operation. The purpose of full faith and credit is to bring finality to litigation and unify the nation. Riley v. New York Trust Co., 315 U.S. 343, 348-49 (1941); Sherrer v. Sherrer, 334 U.S. 343, 355 (1948). The Magnolia rule clearly advanced these

purposes. The new Thomas rule deflects these purposes by injecting a competing full faith and credit interest on the part of other jurisdictions that would compensate a workman who has already been compensated -- an "interest balancing" test. See Thomas, supra, ___ U.S. at ___, 100 S.Ct. at 2668 (Dissenting Opinion). Thus, Thomas is likely to retard the fundamental purposes of full faith and credit to some degree regardless whether the result is applied retrospectively. On balance this factor merely strengthens the case for an application that is prospective only, at least when applied to Texas. Of additional significance in this case is the absence of any evidence of employer overreaching or other abuse of the kind noted by the Thomas plurality in support of its result. See ___ U.S. at ___, 100 S.Ct. at 2662 and n. 31.

Finally, Thomas, if applied retroactively, certainly will produce "substantial inequitable results." Petitioner carrier was by no means alone in thinking that Magnolia was, and would remain, good law -- at least with respect to Texas. Although Thomas later produced a contrary result, the Fourth Circuit had agreed with respect to Virginia law in Pettus v. American Airlines, Inc., 587 F.2d 627 (4th Cir. 1978), and this Court denied review. ___ U.S. ___, 100 S.Ct. 172 (1979).

Ironically, the carrier's exposure is thus at an end (apparently contrary to Thomas) in Pettus while it continues here. This is enormously inequitable.

Although, as a general rule, courts apply the law in effect at the time of their decisions, it is also true that "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . . " United States v. Schooner Peggy, 1 Cranch 103, 110, 2 L.Ed. 49 (1801). Where, as here, rights have become final as affect the immediate parties by virtue of a prior decision, a new rule will be enforced prospectively in order to prevent manifest injustice. E.g., Greene v. United States, 376 U.S. 149, 162 (1964).

Petitioners urge this Court to grant this Petition and hold that the Court of Appeals' result, at least with respect to Texas cases, should be applied prospectively to claims occurring on or after June 27, 1980, the date of this Court's decision in Thomas. Refusal to apply Thomas retroactively would be amply supported by Chevron Oil and other authorities. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 (1964); Ramey v. Harber,

589 F.2d 753, 760 (4th Cir. 1978), cert. denied, ___ U.S. ___, 99 S.Ct. 2823 (1979); United States v. LePatourel, 593 F.2d 827, 831-32 (8th Cir. 1979). Retroactive application of Thomas is manifestly unjust.

This Court's decision is England, supra, is highly supportive of a prospective-only application of Thomas. In England the plaintiffs litigated their federal constitutional claims in State court because a Federal District Court had abstained from considering the federal issues due to the presence of preliminary State law issues over the applicability of the challenged legislation to the plaintiffs. An earlier decision of this Court had indicated that abstention and trial of the entire lawsuit in State court were the correct procedures.

Here, of course, Respondent Landry was by no means compelled to pursue his heart attack compensation claim through the Texas system -- he could have proceeded directly with his LHWCA claim since his injury was covered by the LHWCA as Petitioners then correctly insisted to the State tribunals -- but Landry deliberately persisted at the State level as a matter of his own considered choice. It followed that once Landry, advised by retained counsel, settled his Texas

compensation lawsuit, Petitioners became entitled to claim the protection of the then-prevailing law of res judicata and full faith and credit, which was just as available to Landry as to Petitioners.

In England this Court noted that the plaintiffs and the lower court had been mistaken in their view of the law, but could not say that they "were unreasonable in holding it or acting upon it." 375 U.S. at 422. Equally here, after Thomas these Petitioners may have been mistaken in relying on Magnolia as the controlling law of full faith and credit, but this reliance surely was not unreasonable. Just as this Court relieved the England plaintiffs of the res judicata effect of an adverse State court judgment by holding that its decision (authorizing reservation of federal issues in abstention cases) would only apply prospectively, this Court now should avoid a manifest injustice by holding that Thomas will not apply retroactively to these litigants. A prospective-only application of Thomas is clearly warranted by the circumstances and no constitutional obstacle exists. See Linkletter v. Walker, 381 U.S. 618, 621-22 and n. 3, 629 and n. 14 (1965); Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932). Petitioners are entitled to

relief from harshly inequitable retroactivity.

CONCLUSION

For the reasons herein stated, Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were furnished this 2nd day of July, 1981, to all counsel of record in a manner authorized by applicable law.

DANIEL V. FLATTEN

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APPENDIX A

Opinion of United States
Court of Appeals for
the Fifth Circuit,
dated April 27, 1981

WILSON P. LANDRY, Petitioner,

v.

CARLSON MOORING SERVICE and
Houston General Insurance
Company, Respondents.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, U.S.
DEPARTMENT OF LABOR, Petitioner,

v.

CARLSON MOORING SERVICE and
Houston General Insurance
Company, Respondents.

Nos. 79-1274, 79-1479.

United States Court of Appeals,
Fifth Circuit.

April 27, 1981.

Before TJOFLAT, POLITZ and HATCHETT, Circuit Judges.

TJOFLAT, Circuit Judge:

Wilson Landry and the Director, Office of Workers' Compensation Programs, United States Department of Labor, have filed these consolidated petitions for review of a decision of the United States Department of Labor Benefits Review Board precluding Landry from asserting a right to compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. Sec. 901 et seq. (1976). (For convenience, we hereinafter refer to Landry and the Director in the singular.) We reverse the decision of the Board.

I.

Petitioner suffered a heart attack on February 18, 1974, while employed by respondent, Carlson Mooring Service, at Port Arthur, Texas. Thereafter, he filed compensation

claims against his employer under the LHWCA and the Texas Workmen's Compensation Act, Tex. Rev. Civ. Stat. Ann. arts. 8306 et seq. (Vernon). The Texas Industrial Accident Board dismissed petitioner's state workers' compensation claim, but on review the state district court reversed, holding that Landry could seek relief under the Texas act. At this juncture, the parties settled the case. Pursuant to the requirements of Texas law, the parties submitted their settlement of the worker's compensation claim to the Texas court for formal entry of judgment. See Tex. Rev. Civ. Stat. art. 8307 Sections 5 and 12 (Vernon). The final judgment specified that Landry was to receive the lump sum of $20,000 "in full settlement and satisfaction of all claims and causes of action ... on account of personal injuries sustained by plaintiff ..." Brief for Respondent at 3. Of this amount, $5,000 was awarded to petitioner's attorney.

Upon payment of this lump sum, petitioner executed a general release prepared by his employer's insurance carrier. In pertinent part, that release purported to discharge the insurer's liability for all

> "claims ... or kind of action whether at common law or under any statute, state or federal ... growing out of ... personal injuries alleged to have been sustained and suffered by Wilson P. Landry ..."

Record vol. 1 at 23. After executing this release, Landry withdrew his Longshoremen's Act claim.

Landry later reopened his LHWCA claim. In that action, the administrative law judge awarded compensation. On appeal to the Benefits Review Board, however, the administrative law judge was reversed. The Board held that Landry was precluded from pursuing his LHWCA claim by the doctrines of res judicata, full faith and credit, and election

of remedies. Reasoning that Texas courts would accord res judicata status to judicial approval of a compensation settlement, the Board ruled that Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S. Ct. 208,88 L. Ed. 149 (1943), required it to extend full faith and credit to that final judgment when it was offered as a bar to prosecution of the LHWCA claim. As an alternate, independent ground of decision, the Board held that Landry had elected to pursue his state compensation remedy despite the simultaneous availability of relief under LHWCA, and thus the doctrine of election of remedies prevented him from asserting his rights under the LHWCA. This appeal followed.

II.

It is undisputed that petitioner's employment brought him under the coverage of the Longshoremen's and Harbor Workers' Compensation Act, and that his injury was compensable. The only issues presented for

review are whether the doctrines of full faith and credit or election of remedies preclude Landry's reassertion of his LHWCA claim, and if not, whether his compensation claim under LHWCA should be decreased by the full amount of his state compensation award or decreased by the amount of that award less the sum awarded to his attorney.

A.

The crux of respondent's defense is that full faith and credit, as mandated by 28 U.S.C. Sec. 1738 (1976),[1] requires a ruling that the judicially approved settlement of Landry's state compensation claim bars his

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1. "The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. Such Acts, records and judicial proceedings ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

subsequent assertion of a remedy under the LHWCA. It is not contended that the LHWCA claim was actually litigated in the state courts--it is abundantly clear that the courts of Texas have no power to either entertain LHWCA claims or to approve settlements of them. See Newport News Shipbuilding & Dry Dock, 583 F. 2d 1273, 1278 (4th Cir. 1978), cert. denied, 440 U.S. 915, 99 S.Ct. 1232, 59 L.Ed.2d 465 (1979). See also 33 U.S.C. Sections 915(b) & 916 (1976). Rather, the argument is that Texas law provides that recourse to state workers' compensation remedies is, once pursued to final judgment, the exclusive course available to a litigant. Respondent asserts that availing oneself of the Texas courts for satisfaction of a claim based upon a work-related injury necessarily entails abandonment of alternative claims because Texas courts would treat the Texas judgment as a final adjudication of all such claims. Other tribunals, it is argued,

including federal administrative tribunals, are required to give the same degree of finality to Texas judgments as those judgments are entitled to in the courts of Texas. Thus, the Texas judgment, precluding as it does all further injury-based claims in Texas, would similarly preclude all other such claims when presented to the courts of other jurisdictions.

The Benefits Review Board adopted this position, citing Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S.Ct. 208,88 L.Ed. 149 (1943), as controlling authority. The issue presented in Magnolia was whether a personal injury award under the Texas workers' compensation act barred further recovery, based on the same injury, under the workers' compensation law of Louisiana. The Court held that it did, and in so ruling articulated narrowly the issue for decision:

> Here both Texas and Louisiana have undertaken to adjudicate the rights

> of the same parties arising from a single injury sustained in the course of employment under the same contract. Each state has awarded to respondent compensation for that injury. But whether the Texas award purported also to adjudicate the rights and duties of the parties under the Louisiana law or to control persons and courts in Louisiana is irrelevant to our present inquiry. For Texas is without power to give extraterritorial effect to its laws...The significant question in this case is whether [full faith and credit] has deprived Louisiana of the power to deny that the Texas award has the same binding effect on the parties in Louisiana as it has in Texas.

320 U.S. at 440, 64 S.Ct. at 214.

Landry argues that, while the issue for decision in his case initially appears

identical to that presented in Magnolia, Magnolia need not be followed because it has been preempted by Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140 (1947). Further, Landry asserts that even if Magnolia maintains vitality after McCartin, the unique federal power over admiralty mandates according priority to LHWCA remedies despite the requirements of state law. We emphasize that we do not reach Landry's second contention, as the resolution of his case may be achieved through reconciling the precedential implications of Magnolia and McCartin. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-347, 56 S.Ct. 466, 483, 80 L.Ed 688 (1936) (Brandeis, J., concurring).

The Supreme Court was faced recently with an issue seemingly dispositive of Landry's case. In Thomas v. Washington Gas Light Company, ___ U.S. ___, 100 S.Ct. 2647, 65 L.Ed2d 757 (1980), the petitioner had received a

disability award under the Virginia Workmen's Compensation Act. "[A]s a matter of Virginia law, the Virginia award excluded any other recovery 'at common law or otherwise' on account of the injury in Virginia." Id. at ___, ___n.4, 100 S.Ct. at 2652 n.4. Thereafter, petitioner sought and received benefits under the District of Columbia Workmen's Compensation Act which, for all purposes relevant here, is an exact duplicate of the LHWCA. See id. at ___ n.2, 100 S.Ct.at 2652 n2.On appeal, the Fourth Circuit reversed,holding that allowing recovery under the District of Columbia scheme would deny full faith and credit to the Virginia proceeding.

The Supreme Court reversed the Fourth Circuit, and allowed recovery under the District of Columbia compensation act. We are bound by the precedential impact of that decision, and must apply its teachings here. At best we can discern, Thomas requires

reversal of the Benefits Review Board.

Although the issue for decision in Thomas was clear, the impact of the Supreme Court's holding is not. The Thomas court was faced squarely with the question of whether the ratio deciendi of Magnolia survived McCartin. As adverted to earlier, the Magnolia Court held that a Louisiana award of workers' compensation following an award based on the same injury obtained under the Texas workers' compensation act was barred by the dictates of full faith and credit. Some four years after Magnolia, however, the Supreme Court decided McCartin. There, in apparent self-contradiction, the Court allowed a litigant to recover under the Wisconsin workers' compensation scheme despite earlier receipt of an award for the same injury under Illinois' compensation act. Although grounds existed to distinguish McCartin and Magnolia, see 330 U.S. at 629-630, 67 S.Ct. at 890, the Court instead chose to circumscribe

the impact of Magnolia. Full faith and credit, the Court reasoned, requires preclusion of a second workers' compensation recovery under the law of another state only if the law of the state of initial recovery made it unmistakably clear that by seeking the first award the litigant was abandoning all further injury-based compensation claims. Applying this reasoning, the court held that

> [T]here is nothing in the [Illinois] statute or in the decisions thereunder to indicate that it [the initial award] is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of . . . employment. And in light of the rule that workmen's compensation laws are to liberally construed in the furtherance of the purpose for which they were enacted,

> we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision . . . is brought into play.

McCartin, 330 U.S. at 627-28, 67 S.Ct. at 889 (emphasis added) (citations omitted).

Thomas, therefore, presented the issue of how unmistakable state law must be for Magnolia to control a litigant's attempt to secure a second workers' compensation award under the law of a second state. Rather than

resolving this question, however, a plurality of the Supreme Court simply held that

> [A] State has no legitimate interest within the context of our federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power to apply its workmen's compensation law in the first instance. The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards. Accordingly, Magnolia Petroleum Co. v. Hunt should be overruled.

Thomas, ___ U.S. at ___, 100 S.Ct. at 2647. The plurality reached this holding through a substantial re-evaluation of the doctrine of full faith and credit. See id. at ___, 100 S.Ct. at 2655-2663. Three other justices,

however, crucial to the efficacy of the plurality's decision, concurred in the reversal of the Fourth Circuit on significantly different grounds. Instead of reinterpreting the requirements of full faith and credit and disowning Magnolia, these three justices, see id. at ___, 100 S.Ct. at 2663, would read Magnolia and McCartin together and hold that "since Virginia's Workmen's Compensation Act lacks the 'unmistakable language' which McCartin requires if a workmen's compensation award is to preclude a subsequent award in another state," id. at ___ 100 S.Ct. at 2665, Magnolia would not demand that the District of Columbia give preclusive effect to the Virginia ruling.

Because "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds," Gregg v. Georgia, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 2923 n.15, 49 L.Ed2d 859 (1976) (opinion of Justice Stewart); see also Barksdale v. Blackburn, 639 F.2d 1115, 1120

5th Cir. 1981) (en banc), we believe that despite the broad language of the plurality in Thomas, we must reach our decision on the more limited ground provided by the concurring justices.[2] It appears that a majority of the justices could agree that the unmistakable language requirement of McCartin should control disposition of a case otherwise on all fours with Magnolia.[3]

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2. The plurality decision in Thomas appears inapposite also because it is limited to the preclusive effect of a state administrative decision, rather than of a state court judgment. See Thomas, ___ U.S. at ___, 100 S.Ct. at 2661-2663 (Opinion of Justice Stevens). But see id. at ___, 100 S.Ct. at 2663 (Opinion of Justice White) and id. at ___, 100 S.Ct. at 2667 (Rehnquist, J., dissenting.)

3. We must emphasize that at best our determination of the precedential value of Thomas is premised on an educated guess concerning what view a majority of the Court could agree upon. See McMillan v. Escambia County, No. 78-3507, slip op. at 4317, 4321 (Feb. 19, 1981). We are not al all comfortable in so evaluating Thomas, but feel that no other avenue is available given our duty to follow the lead of the Supreme Court.

See Thomas, ___ U.S. at ___, 100 S.Ct. at 2658 (Opinion of Justice Stevens); id. at ___, 100 S.Ct. at 2665 (Opinion of Justice White) ("I agree with the plurality that McCartin, is controlling as between the two precedents . . ."). We therefore will apply the McCartin test to Landry's case.

[U] Absent unmistakable language, in either the Texas Workmen's Compensation Act or the cases construing it, declaring recovery under the Texas act a final adjudication of all claims possibly arising from the injury, McCartin requires a finding that a subsequent recovery under the workers' compensation act of another jurisdiction is proper. Thus, the issue here is whether the law of Texas provides such unmistakable language. We find that it does not.

Respondent offers three Texas statutes to support its assertion that Texas unmistakably provides that recovery under its workers' compensation act is intended to be exclusive.

In evaluating the impact of these statutes, we are guided by the commentary of the Supreme Court. Discussing the McCartin test, the Court emphasized the strictness of the unmistakable language requirement; of all the states,

> [a]pparently only Nevada's workmen's compensation act contains the unmistakable language required under the McCartin rule. Nev.Rev.Stat. Sec. 616.525 (1979) provides in part: ". . . [I]f an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside the state, and he . . . accepts any compensation or benefits under the provisions of this chapter, the acceptance of such compensation shall constitute a waiver by such employee . . . of all rights and

remedies against the employer at common law or given under the laws of any other state and shall further constitute a full and complete release of such employer from any and all liability arising from such injury . . . " (Emphasis added)

Thomas, ___ U.S. at ___ n.21, 100 S.Ct. at 2657 n.21. Viewing the statutes offered by respondent in this light, it is clear that their language is inadequate. First respondent presents us with Tex.Rev.Civ.Stat. Ann. Art. 8307, Sec. 5 (Vernon), which reads in relevant part:

Notwithstanding any other provision of this law, as amended, no award of the Board, and no judgment of the court, having jurisdiction of a claim against the [insurance carrier] for the cost or expense of items of medical aid, hospital services, nursing,

chiropractic services, medicines or prosthetic appliances furnished to an employee under circumstances creating a liability therefor on the part of the [insurance carrier] under the provisions of this law, shall include in such award or judgment any cost or expense of any such items not actually furnished to and received by the employee prior to the date of said award or judgment. The first such final award or judgment rendered on such claim shall be res judicata of the liability of the [insurance carrier] for all such cost or expense which could have been claimed up to the date of said award or judgment and of the issue that the injury of said employee is subject to the provisions of this law with

respect to such items, but shall not be res judicata of the obligation of the [insurance carrier] to furnish or pay for any such items after the date of said award or judgment. After the first such final award or judgment, the Board shall have continuing jurisdiction in the same case to render successive awards . . .

As we read this provision, there is no stated intent to make an award under Texas law conclusive of litigant's rights under the law of another jurisdiction, and it is clear evidence of that intent which McCartin requires to be unmistakably present.

Second, Tex.Rev.Civ.Stat.Ann. Art. 8306, Sec. 19 (Vernon), the statute relied upon in Magnolia, is said to preclude Landry's recourse to the LHWCA:

"If an employee, who has been

> hired . . . in this State, sustains injury in the course of his employment he shall be entitled to compensation according to the law of this State even though such injury was received outside of the State, . . . Providing, . . . that no recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the state where such injury occurred."

We see no way in which this statute can be relevant to an asserted preclusion of Landry's recourse to his compensation remedy under the LHWCA. As the Supreme Court has noted:

> In Magnolia, the Court noted the existence of a Texas statute precluding a supplemental award in Texas when an injured worker had obtained an award under the workmen's compensation law of another

State. 320 U.S. at 435, 64 S.Ct. at 211. But that provision, of course, wad directed not at the effect Texas desired a Texas award to be given in a second State, but rather at the converse situation. That is, it governed the effect that the Texas Industrial Accident Board has to give to an award previously rendered in another State. See id., at 454, 64 S.Ct. at 220 (Black, J., dissenting). While the Texas Statute so understood may be obliquely probative of the Texas Legislature's intent as regards the effect to be given a Texas award in another State, that intent is surely not indicated with the unmistakable language required by McCartin.

Thomas, ___ U.S. at ___ n.21, 100 S.Ct. at 2657-58 n.21.

Finally, respondent presents Tex.Rev. Civ.Stat.Ann. Art. 8306, Sec. 3 (Vernon): "[Employee covered by the Texas insurance program] shall have no right of action against their employer . . . for damages for personal injuries . . . but such employees . . . shall look for compensation solely to the [insurance carrier]." This statute, and others like it, have been consistently held not to include the unmistakable language necessary to satisfy McCartin. See Thomas, ___ U.S. at ___, 100 S.Ct. at 2658, and numerous authorities cited at id. at ___ n.22, 100 S.Ct. at 2658 n.22. Respondent has offered no reason for us to differ from these holdings.

The recent case law of Texas also belies respondent's position. In Johnson v. Texas Employers Insurance Ass'n, 558 S.W.2d 47 (Tex.Civ.App.1977) (writ refused, n.r.e.),

the highest Texas court to consider the legality, under Texas law, of following a state workers' compensation award with recovery under the LHWCA has opined:

> As to the argument that concurrent jurisdiction [state compensation and LHWCA] will result in double recovery, when the State award comes first Calbeck supra, has removed that fear [by indicating that credit for state law payments will be made against a LHWCA recovery].

Id. at 52 (emphasis added). Thus, the Texas courts have tacitly acknowledged that a Texas workers' compensation award may be followed by recovery under the LHWCA.

For the foregoing reasons, we must hold that Texas law does not provide the unmistakable intent required by McCartin. We note in concluding this portion of our opinion that respondent has placed some emphasis upon what it feels is the preclusive

intent of the release executed by Landry. Three comments are in order. Initially, the release is not part of the Texas judgment, and therefore is irrelevant to the issue of full faith and credit. Second, if it has any probative value, the release indicates that the parties perceived a need, despite the judgment here offered as a bar to Landry's recourse to the LHWCA, for an agreement limiting Landry's ability to seek a supplemental award. Thus, the release itself illustrates respondent's understanding that the Texas judgment did not, by itself, necessarily bar Landry's access to his LHWCA remedy. Finally, the release is, by clear statutory command, completely ineffectual to preclude Landry's LHWCA claim. See 33 U.S.C. Sec. 915(b)(1976).

B.

[2,3] Now we are able to address respondent's election of remedies defense. That doctrine precludes a litigant from

pursuing a remedy which, in a prior action, he rejected in favor of a simultaneously available alternate remedy. The decision to pursue the first remedy is construed as a binding election on the part of the litigant which precludes subsequent pursuit of the alternative course. See Newport News Shipbuilding & Dry Dock v. Director, 583 F.2d 1273, 1276 (4th Cir. 1978), cert. denied, 440 U.S. 915, 99 S.Ct. 1232, 59 L.Ed.2d 465 (1979). By definition, the doctrine of election of remedies is therefore inapplicable when "the second remedy which is pursued following an alleged 'election' is not theoretically irreconcilable with the first, and does not require a claimant to assume a position inconsistent with that which he took in his initial quest for relief." Id. 583 F.2d at 1277.

In Sun Ship, Inc. v Commonwealth of Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432,

65 L.Ed.2d 458 (1980), the Supreme Court held that the LHWCA, as amended, did not preempt state compensation laws. The decision recognized that, absent an indisputable state declaration precluding pursuit of an LHWCA claim after recourse to a state compensation remedy, LHWCA and state workers' compensation claims are not mutually exclusive, but, rather are complementary remedies which may be pursued successively by the litigant. Id. at 724 n.6, 100 S.Ct. at 2438 n.6. Instead of precluding recourse to the LHWCA after litigation of a state compensation claim, or vice-versa, the structural relationship between the federal and state longshoremen compensation schemes merely mandates the crediting of amounts received under one system against the amount allowed by the other. Id. at 719-726, 100 S.Ct. at 2436-2439.

[4] Given our resolution of respondent's

full faith and credit defense, it is quite clear that election of remedies is irrelevant in the context of Landry's case; there is no indisputable Texas preclusion of recourse to LHWCA remedies after litigation of a Texas workers' compensation claim, and thus there is simply no basis for finding an election between mutually exclusive alternatives.

C.

[5,6] Although we allow Landry to seek a supplemental award under the LHWCA, we recognize that concurrent applicability of these state and federal workers' compensation schemes does not sanction double recovery. Thus, when workers "commence their actions under state law [they] will generally be able to make up the difference between state and federal benefit levels by seeking relief under the Longshoreman's Act, if the latter applies." Sun Ship, Inc. v. Commonwealth of Pennsylvania, 477 U.S. at 723, 100 S.Ct.

at 2438 (emphasis added). Landry will therefore be required to credit his Texas award against any recovery he may attain under the LHWCA.

Under Texas law, attorney fees received in workmen's compensation proceedings consist of a percentage, subject to court or Industrial Accident Board approval, of a claimant's total recovery. See Tex.Rev.Civ.Stat.Ann. art. 8306, Sec. 7(c) & (d) (Vernon). Attorney fees, therefore, are not a separate element of damages. Thus, respondent urges that in crediting the state recovery against any LHWCA award, the total state amount, undiminished by that amount subsequently allocated to Landry's attorney, should be put toward respondent's LHWCA liability.

This argument misperceives the purpose of crediting: avoidance of double recovery for compensable injuries. The amount of Landry's state award which has been allo-

cated to his attorney did not serve as compensation for his injury, but rather as reimbursement for the expenses he incurred by having to resort to the courts for compensation. To credit that sum against an LHWCA compensation award is to mix apples and oranges; such a crediting procedure would not obviate double recovery, as the LHWCA award does not duplicate Landry's de facto recovery of litigation expenses under state law. Rather, the LHWCA award should be diminished only by state compensation the plaintiff actually realizes. See Globe Indemnity Co. v. Calbeck, 230 F.Supp. 14 (S.D.Tex.1960).

The decision of the Benefits Review Board is REVERSED, and the cause is REMANDED for proceedings consistent with our opinion.

APPENDIX B

Order of United States
Court of Appeals for the
Fifth Circuit Denying
Petition for Rehearing and
Suggestion for Rehearing
En Banc, dated May 28, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 79-1274

WILSON P. LANDRY,

Petitioner,

versus

CARLSON MOORING SERVICE AND HOUSTON GENERAL INSURANCE COMPANY,

Respondents.

NO. 79-1479

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Petitioner,

versus

CARLSON MOORING SERVICE, et al.,

. . . . . Respondents.

On Petitions for Review of an Order of the Benefits Review Board

. . . . . .

AB1

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 27, 1981, 5 Cir., 198_, _____ F. 2d____).

(Filed May 28, 1981)

BEFORE: TJOFLAT, POLITZ and HATCHETT, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appel-

late Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/ Gerald H. Tjoflat
United States Circuit Judge

CLERK'S NOTE:

SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

Form 704-2

APPENDIX C

Order of United States
Court of Appeals for the
Fifth Circuit Denying
Motion to Stay Mandate,
dated June 19, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-1274

WILSON P. LANDRY,

Petitioner,

versus

CARLSON MOORING SERVICE and HOUSTON GENERAL INSURANCE COMPANY,

Respondents.

NO. 79-1479

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR.

Petitioner,

versus

CARLSON MOORING SERVICE, ET AL,

. . . . . Respondents.

Petition for Review of an Order of the Benefit Review Board

. . . . . .

AC1

(Filed June 19, 1981)

O R D E R :

(X) The motion of respondents for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of respondents for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within

that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Gerald H. Tjoflat
United States Circuit Judge

APPENDIX D

Decision of Benefits
Review Board, dated
December 29, 1978

WILSON P. LANDRY Claimant-Respondent v. CARLSON MOORING SERVICE and HOUSTON GENERAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	BRB No. 77-658 DECISION

Before: SMITH, Chairman, MILLER and KALARIS, Members.*

SMITH, Chairman:

This is an appeal by the employer/carrier (hereinafter, employer) from a Decision and Order (77-LHCA-129) of Administrative Law Judge Freeman C. Murray pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33

U.S.C. Sec. 901 et seq. (hereinafter, the Federal Act).

On February 18, 1974, claimant suffered a myocardial infarction (heart attack) while working for employer. Claimant's job duties consisted of tying up ships as they docked. He did not work on the ships but on the shoreline.

Claimant filed a claim under the Texas Workmen's Compensation Law (hereinafter, the Texas Act) and the Federal Act. Employer denied liability under the Texas Act, contending that claimant's sole relief was under the Federal Act. The Texas State Industrial Accident Board (the IAB) dismissed the claim, finding that it does not fall within the provisions of the Texas Act. Claimant appealed this denial of jurisdiction by filing suit in Texas State District Court to have the IAB's decision set aside. Employer again argued that

claimant's sole relief lay under the Federal Act. On June 12, 1975, the Texas Court denied employer's Plea to the Jurisdiction and In Abatement. The Court ordered the case to proceed to trial under the Texas Act.

On June 13, 1975, the parties reached agreement in the case. The final judgment, signed by the Texas Court and entered into the record, incorporated the terms of the parties' agreement. It provided that claimant was to receive $20,000.00 from employer in satisfaction of all his claims against employer for personal injuries sustained in the February 1974 accident. The judgment ordered employer to pay for claimant's future medical expenses; it precluded claimant from receiving past medical expenses. The judgment further ordered that the decision of the IAB be set aside.

In addition to the settlement agreement, claimant signed a release form in which he discharged employer from liability for any further claims related to the February 18, 1974 illness. He specifically agreed that the judgment may be pleaded as an absolute bar to "any and all claims...or kind of action whether at common law or under any statute, state or federal...on account of, growing out of, related to or concerning ...personal injuries alleged to have been sustained and suffered by Wilson P. Landry on or about the 18th day of February, 1974 ..." This release form was signed by claimant and properly notarized. It was not incorporated as part of the final judgment issued by the Texas Court.

With the assistance of a different attorney, claimant later re-opened his claim under the Federal Act. He claimed that he was permanently and totally disabled as a result of

the February 1974 heart attack. Employer denied liability asserting that claimant was estopped from pursuing his federal claim due to the prior, final adjudication of his state claim and his written release of employer from any further liability.

On August 26, 1977, the administrative law judge issued his Decision and Order. He found claimant subject to the jurisdiction of the Federal Act, and that the prior adjudication of his state claim did not act as a bar to his federal claim. He further found claimant permanently and totally disabled as a result of the February 1974 heart attack. He ordered employer to pay compensation benefits to claimant. Employer's payment was credited in the amount of $14,945.25, the amount claimant realized from the previous state settlement after deduction of his attorney's fee and costs. In a Decision and Order on Recon-

sideration, the Administrative Law Judge also assessed additional compensation pursuant to Section 14(e) of the Federal Act, 33 U.S.C. Sec. 914(e).

Employer appeals the Decision and Order on three separate grounds. It first alleges that claimant is barred from federal relief by the final, favorable settlement and judgment of his state claim under the doctrines of estoppel by judgment and election of remedies. Second, employer argues that if the federal claim is not barred and the award of federal compensation is affirmed, the award should be offset by the full $20,000.00 settlement amount, not the lesser amount claimant actually realized. Finally, employer appeals the assessment of additional compensation under Section 14(e) of the Federal Act.

We conclude that claimant is barred from relief under the Federal Act by the final

judgment and satisfaction of his state claim.

Employer argues that, under the doctrine of estoppel by judgment, the prior Texas judgment bars claimant's present suit under the Federal Act. By its usage, we can assume that employer intends to argue that res judicata, not estoppel by judgment (collateral estoppel), is applicable to the present case.[1] Res judicata must be distinguished from collateral estoppel. Under the doctrine of res judicata, a judgment in a prior

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1. The nomenclature in this area of the law varies among practitioners. See 46 AM. JUR. Judgments Sec. 397 (2d ed. 1969). Both employer's and claimant's attorneys are unclear regarding their usage of the terms res judicata, estoppel by judgment, and collateral estoppel. This lack of clarity at times makes their arguments difficult to comprehend. The Board in this Decision uses the Supreme Court definitions.

suit[2] involving the same parties or their

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2. The rule is often stated that the judgment must be "on the merits." However, a judgment can be res judicata regarding liability where the judgment merely embodies the parties' settlement of their controversy and the court has made no determination of the merits of the case. United States v. Int'l Bldg. Co., 345 U.S. 502, 506 (1955), concerned a Tax Court decision embodying the Internal Revenue Commissioner's stipulation regarding deficiencies for certain taxable years. The Supreme Court held that the decision was res judicata as to the amount of the taxpayer's federal income tax liability for those years, even though the decision was not res judicata as to the depreciable value of the taxpayer's property: the Tax Court had made no determination on the merits of the case. The Court concluded that the Tax Court decisions were "only a pro forma acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed." Like the Texas State Court in the present case, the Tax Court in Int'l Bldg. Co. entered the parties' agreement as its judgment. The Tax Court, like the Texas State Court, did not hold a hearing on the issues, enter any stipulations of fact, receive any briefs, hear any arguments, or make any determinations on the merits of the controversy.

For a recent Fifth Circuit Court of Appeals interpretation of res judicata, see Int'l Ass'n of Machinists & Aerospace Space

privies bars a second suit based on the same cause of action. Collateral estoppel precludes relitigation only of those issues actually litigated and determined in a prior suit regardless of whether the second suit is based on the same cause of action as the first suit. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955).

There is no doubt that claimant's suit under the Federal Act is on the same cause of action as his Texas Act Claim.[3] In

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Workers v. Nix, 512 F.2d 125, 131 (1975). The Court there did not mention that a prior judgment must be "on the merits"; it held that it must be final and valid. Such a judgment is conclusive "as to all matters, fact and law, that were or should have been adjudicated in the proceedings."

3. Contra, Newport News Shipbuilding & Dry Dock Co. v. Jenkins, No. 77-1886 (4th Cir. Sept. 21, 1978).

Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943), it was argued that an award of compensation made under Texas law was not res judicata in Louisiana because the Louisiana suit, while seeking compensation for the same injuries, was on a different cause of action. The Supreme Court rejected this argument. It found that the "injury in Texas did not give rise to two causes of action merely because recovery in each state is under a different statute, or because each affords a different measure of recovery ...The grounds of recovery are the same in one state as in the other -- the injury to the employee in the course of his employment." 320 U.S. at 444.

Because the same cause of action is at issue in the present case as was at issue in the Texas case, and because there is the requisite identity of parties, res judicata is the proper doctrine to apply. We there-

fore are presented with the same question as was presented to the Supreme Court in Magnolia Petroleum Co. v. Hunt, supra: whether under the full faith and credit clause, Art. IV, Section 1 of the Constitution,[4] the judgment rendered in claimant's case under the Texas Act bars a further recovery of compensation for the same injury under the Federal Act. By statute, 28 U.S.C. Section 1738,[5] this rule applies to federal as well as state courts. Davis v. Davis, 305 U.S. 32 (1938); Durfee v. Duke,

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4. U.S. Const. Art. IV, Section 1:

> "Full Faith and Credit shall be given in each State to the public Act, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Act, Records and Proceedings shall be proved, and the Effect thereof."

5. 28 U.S.C. Section 1738 (1966):

375 U.S. 106 (1963). Therefore, it is irrelevant that we are dealing here with a federal versus state compensation scheme

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> "The acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved, or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that said attestation is in proper form.
>
> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

instead of a state versus state compensation scheme.[6]

Full faith and credit requires every state or federal jurisdiction to give to any state court judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it. Durfee v. Duke, supra. We therefore must determine what res judicata effect the Texas Act judgment in this case would be accorded in Texas.

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6. In fact, the Supreme Court in Magnolia relied on its decision in Chicago, R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611, 617 (1926). In Schendel, an award under the Iowa Workmen's Compensation Act was held to bar recovery in a suit against the employer in Minnesota to recover for the same injury under the Federal Employers' Liability Act. Both states had allowed recovery as they were free to do. The Supreme Court held that the employee, having had his remedy by the judgment in Iowa, was precluded by the full faith and credit clause from pursuing a remedy for his injury in another state. See also Williams v. Ocean Transport Lines, Inc., 425 F.2d 1183 (3d. Cir. 1970).

The Texas Act provides for adjudication of an employee's compensation claim by the IAB. Tex. Ann. Civ. St. Art. 8307, Section 5. The Texas Act also provides for settlement of a claim "[w]here the liability of the association [insurer] and the extent of the injury of the employee is uncertain, indefinite or incapable of being satisfactorily established." Tex.Ann.Civ.St.Art. 8307 Section 12. A settlement agreement entered into by the interested parties has legal effect under the Texas Act only when it is approved by the IAB or the court. Tex.Ann. Civ.Art. 8307, Section 12; Esco v. Argonaut Insurance Co., 405 S.W.2d 860 (Tex.Civ.App. 1966).

In the present case, there is a settlement agreement made by the parties which was then approved by the court and issued as its final judgment. The Texas courts distinguish this type of judgment from a final judgment issued

after trial. Angelina Casualty Co. v. Bennett, supra at 274. The present type of judgment is not governed by that section of the Texas Act concerning awards and judgments of compensation. Rather, it is governed by Section 12 of the Texas Act concerning settlements of a compensation claim. Pearce v. Texas Employers' Insurance Association, 403 S.W.2d 493 (Tex. Civ. App. 1966), aff'd, 412 S.W.2d 647 (Tex. Sup. Ct. 1967); Angelina Casualty Co. v. Bennett, supra. Section 12 is silent regarding the res judicata effect of an IAB or court-approved agreement.

The Texas courts have not specifically addressed this res judicata question. The courts have found that the approval of a settlement is neither an award of compensation nor a judgment awarding compensation. Commercial Casualty Co. v. Hilton, 87 S.W.2d 1081 (Tex. Comm. App. 1935); Pearce v. Texas

Employers' Insurance Association, supra; Lursen v. Transamerica Insurance Co., 550 S.W.2d 171 (Tex. Civ. App. 1977). Nor is it an adjudication on the merits of the employee's claim. Lumberman's Reciprocal Association v. Day, 17 S.W.2d 104 (Tex. Comm. App. 1929); Lowry v. Anderson-Berney Building Co., 161 S.W.2d 459 (Tex. Comm. App. 1942). Rather, an approved settlement agreement is treated as a contractual matter between the parties. See, e.g., Texas Employers' Insurance Association v. Kennedy, 143 S.W.2d 583 (Tex. Comm. App. 1940); Brannon v. Pacific Employers' Insurance Co., 224 S.W.2d 466 (Tex. Sup. Ct. 1949); Esco v. Argonaut Insurance Co., supra; Barnes v. Bituminous Casualty Co., 495 S.W.2d 5 (Tex. Civ. App. 1973).

However, while a court-approved settlement agreement "does not constitute a judgment in the ordinary sense of the word," Angelina Casualty Co. v. Bennett, supra at 275, it is

binding upon the parties once the court approves it, Esco v. Argonaut Insurance Co., supra at 862; Angelina Casualty Co. v. Bennett, supra at 275,[7] unless set aside for fraud or other equitable grounds. Commercial Casualty Insurance Co. v. Hilton, supra at 863. Further, an approved settlement agreement "supersedes" the original compensation claim. Esco v. Argonaut Insurance Co., supra at 863; Barnes v. Bituminous Casualty Corp., supra at 8. It constitutes a bar to any other claim for compensation by the employee. Lumberman's Reciprocal Association v. Day, supra at 1044.

Thus, it appears that Texas courts consider judicial approval of a settlement agreement as a hybrid form of judgment. However,

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7. Settlement agreements reached at the IAB level are not binding until approved by the IAB. Art. 8307, Sec. 12; Brannon v. Pacific Employers' Ins. Co., supra; Barnes v. Bituminous Cas. Corp., supra.

this type of judgment is nonetheless conclusive of an employee's right to compensation for injuries sustained in an employment-related accident. Because the court-approved settlement agreement (judgment) in the present case has become final, Texas would treat it as res judicata of any further claim for compensation related to the 1974 heart attack. Therefore, the demands of full faith and credit require us to hold that the approved settlement agreement, which was adopted by the Texas court as its final judgment, acts as a complete bar to claimant's federal claim for compensation on the same cause of action. American Surety Co. v. Baldwin, 287 U.S. 156 (1932).

The Director, Office of Workers' Compensation Programs, urges this Board to adopt the ruling in Industrial Commission v. McCartin, 300 U.S. 622 (1947). The Supreme Court there held that a prior award of compensation under

the Illinois Workmen's Compensation Act did not preclude a subsequent award for additional compensation under the Wisconsin Workmen's Compensation Act. The Court so decided because, by the terms of the statute itself and the relevant case law, recovery under the Illinois statute did not preclude recovery under the statutes of other states. The Court relied also on a clause in the Illinois award specifically stating that the award did not affect the employee's rights against the employer under the Wisconsin statute. In fact, the Court found the clause "of decisive significance," given the non-exclusive nature of the Illinois Act. The judgment in the present case, however, did not include a clause reserving claimant's rights under the Federal Act. Rather, it provided that claimant was to receive $20,000.00 "in full settlement and satisfaction of all claims and causes of action of said plaintiff [claimant] against said defendant [employer's

insurance7 on account of personal injury sustained by plaintiff as alleged in the Petition herein . . . "[8] (emphasis added). Therefore, whatever the precedential value of the ruling in McCartin, it is inapplicable to claimant in this case.[9]

We conclude that the ruling in Magnolia Petroleum Co. v. Hunt, supra, is applicable.[10] In Magnolia, the Supreme Court held that a prior award of compensation under the Texas Act precludes an additional recovery of

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8. Claimant's Petition in the state case refers to the February 1974 heart attack and his resulting disability.

9. The Court in McCartin, supra at 628, did not state whether the Illinois statute, not barring compensation from other states, alone would support its holding. The Board will not speculate on whether the Court implied that it would.

10. It should be noted that Magnolia was not overruled by the decision in McCartin. See, Gasch v. Britton, 202 F.2d 356, 358 (D.C.Cir. 1953); Pettus v. American Airlines, Inc., No. 77-2230 (4th Cir. Sept. 26, 1978).

compensation under the Louisiana Workmen's Compensation Law. The Supreme Court based its decision on two grounds: (1) Section 19 of the Texas Act[11] was found to prohibit a second recovery of compensation for the same injury and (2) the Texas award, once final, was res judicata in Texas regarding the employee's right to compensation for his injury. As such, the award was entitled to the same faith and credit as a judgment of a court: it acted to bar the claim in Louisiana.

In the present case, we also are dealing with the Texas Act. Section 19 is still in effect and, under Magnolia, prevents an employee who has received one compensation award from seeking a second award for the same injury

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11. Tex. Ann. Civ. St. Art. 8307, Sec. 19:

> "Under this statute a compensation award may not be had in Texas if the employee has claimed and received compensation for his injury under the laws of another state."

in another jurisdiction. Further, the above discussion indicates that the final judgment in this case is res judicata in Texas of claimant's right to compensation for the 1974 heart attack: it bars a claim for additional compensation. The Board therefore is compelled under the doctrine of full faith and credit to hold that the Texas award bars claimant's suit under the Federal Act.

As the Supreme Court stated in Magnolia, supra at 439:

> These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one

state is likewise merged in every other.

Turning to employer's second ground of appeal, we conclude that under the doctrine of election of remedies, as well, claimant is barred from relief under the Federal Act by the final judgment and satisfiaction of his Texas Act claim.

An election of remedies is the "act of choosing between different remedies allowed by law on the same state of facts where the party has but one cause of action, one right infringed, one wrong to be redressed." Essington v. Parish, 164 F.2d 725 (7th Cir. 1939). It has no application where remedies available are concurrent and consistent. Pierce v. United States, 255 U.S. 398 (1921). Therefore, where a party has two or more concurrent and consistent remedies available, he may prosecute one or all until one remedy has been satisfied. Smith v. Lykes Brothers-Ripley Steamship Co., Inc., 105 F.2d 604

(5th Cir. 1939), cert. denied, 308 U.S. 604 (1939). Where remedies are consistent, it is satisfaction of a claim which operates as a bar. Abdallah v. Abdallah, 359 F.2d 170 (3rd Cir. 1966).

In the present case, claimant filed compensation claims under both the Federal and Texas Acts for his February 1974 heart attack. Clearly, these remedies are consistent with one another; claimant relies upon the same state of facts in both actions to establish his right to compensation. Northern Assurance Co. v. Grand View Building Association, 203 U.S. 106 (1906). Therefore, once claimant pursued his Texas Act remedy to a final, satisfied judgment, he was barred from pursuing his remedy under the Federal Act. Windrem v. Bethlehem Steel Corp., 293 F. Supp. 1 (D.N.J. 1968).

Windrem, decided prior to the 1972 Amendments to the Federal Act, involved a factual

pattern virtually identical to the present case. The claimant in Windrem pursued his claim under the New Jersey Workmen's Compensation Act despite employer's challenge to state jurisdiction. Employer there, as here, contended that claimant's sole relief was under the Federal Act; it had made voluntary payments under the Federal Act for temporary disability. With assistance of counsel, claimant pursued his state claim to a formal hearing where an award of compensation was made in his favor. Thereafter, he filed a compensation claim for the same injury under the Federal Act.

In finding claimant barred from federal relief, the Windrem Court relied on the facts of the case; i.e., that claimant, entitled to compensation under both the New Jersey and Federal Acts, made a deliberate election to proceed to the state award. His election therefore was binding. We fully concur with

the reasoning in that case and find it applicable to claimant here.

We note also the decision in Holland v. Harrison Brothers Dry Dock & Repair Yard, Inc., 306 F.2d 369, 373 (5th Cir. 1962). In Holland, the Court of Appeals held that a claimant, entitled to relief under both the Texas and Federal Acts, has not made a binding election of remedies "[u]ntil the claim is litigated once or settled by a binding compromise settlement agreement . . ." (emphasis added). Until either event occurs, a claimant is not precluded from bringing a second suit on the same injury. Clearly, claimant here has proceeded to a binding compromise settlement. Claimant's deliberate election of his Texas Act claim precludes him from seeking further compensation under the Federal Act.

In reaching this conclusion, we are cognizant of case law establishing that mere

acceptance of state compensation does not preclude further recovery of compensation under the Federal Act. See Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962); Holland v. Harrison Brothers Dry Dock & Repair Yard, Inc., supra. However, these cases involved claimants who merely accepted voluntary payment of compensation. Each case is limited to its circumstances. Calbeck, supra at 379; Holland, supra at 373. The Court of Appeals in Holland was especially careful to distinguish between a claim finally litigated or settled by a binding compromise agreement and one where there was nothing more than mere acceptance by an employee of voluntary payments under state law. By comparison, claimant in the present case actively enforced his rights under the Texas Act. There was no "mere acceptance" of benefits.

One final note is in order. It is with regret that we must find against claimant in

this case. We cannot understand why claimant's first attorney pursued the state claim to a final conclusion given the disparity between the compensation levels of each act. It appears that the more prudent course of action would have been to seek compensation under the Federal Act. Even though we empathize with claimant's position, we must decide this case according to what we feel the law dictates.

Accordingly, claimant is barred from seeking compensation under the Federal Act by the full faith and credit clause and by his deliberate election of remedy. The administrative law judge's Decision and Order is reversed.

Dated this 29th day of December, 1978

MILLER, Member, dissenting:

I am unable to join in the majority opinion in this case. I do not believe that res judicata, full faith and credit or election

of remedies bar claimant from seeking additional compensation under the Federal Act.

I.

The majority relies heavily upon the Supreme Court decision in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). They correctly note that Magnolia has not been specifically overruled by the Supreme Court. However, due to the Court's decision in Industrial Commission v. McCartin, 330 U.S. 622 (1947), I feel that Magnolia does not control the result of this case.

McCartin is factually similar to the present case. There an Illinois resident was injured while working in Wisconsin. He began compensation proceedings in both states. While the Wisconsin proceedings were pending, the Illinois compensation commission issued a formal order approving a settlement agreement under Illinois law. Full payment was made in accordance with the order. The employee then sought an additional award under

the Wisconsin statute. Relying on Magnolia, the Wisconsin Supreme Court denied a supplementary recovery. The United States Supreme Court on appeal reversed the denial. It held that the Illinois award did not bar an additional recovery of compensation under the Wisconsin statute.

The majority distinguishes McCartin from the instant case. They note as decisive the clause in the Illinois award reserving the employee's rights under the Wisconsin statute, and the failure of the judgment in the present case to include a similar clause. It is undisputed that the McCartin court gave deference to the reservation clause. However, I feel that to distinguish McCartin from the instant case on that basis negates the true impact of McCartin. "It is now generally accepted that the McCartin case, in practical effect, has recognized the principle of successive awards and thereby discredited

the Magnolia case . . . "

4 A. LARSON, WORKMEN'S COMPENSATION LAW Sec. 85.10 (1977)

The unanimous McCartin decision began by stressing the failure of the Illinois statute and case law to specifically prohibit an individual from seeking additional relief under the laws of another state. Section 6 of the Illinois Workmen's Compensation Act, Ill. Rev. Stat. 1943, Ch. 70 Sec. 6, was the applicable section:

> Section 6 states that "No common law or statutory right to recover damages for injury or death sustained by an employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act, . . . "
> This section has been interpreted

to mean that, in situations to which the Act applies, the right of action against the employer under the Illinois common law or under the Illinois Personal Injuries Act has been abolished. To that extent, the Act provides an exclusive remedy.

330 U.S. at 627 (citations omitted).

From this discussion of the Illinois Act, the Court concluded:

> [T]here is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. And in light of the rule that workmen's compensation laws are to be liberally

> construed in furtherance of the purpose for which they were enacted, Baltimore & Phila. Steamboat Co. v. Norton, 284 U.S. 408, 414, we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play.

330 U.S. at 627-28 (citations omitted, emphasis added).

The McCartin Court held that the Illinois award was final and conclusive only as to rights arising in Illinois; Wisconsin was free under the full faith and credit clause to award additional compensation according to its own laws.[1] Before an employee's right to seek compensation from a second state is extinguished, McCartin requires "unmistakable language" in the first state's compensation act or case law indicating that it is "completely exclusive," precluding recovery even under the laws of another state. It is with this requirement in mind that I conclude that the federal award is not barred by the prior Texas judgment.

I believe that the Supreme Court after the McCartin decision would not issue the

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1. See also Newport News Shipbuilding & Dry Dock Co. v. Director, 583 F.2d 1273, 1277 (4th Cir. 1978) where the Court of Appeals held that the "exclusivity" provision of the Virginia compensation statute, similar in wording to the Illinois Statute, did not bar an award under the Federal Act.

same ruling as it did in Magnolia if faced with the same facts as presented in Magnolia. I found no provision in the Texas Act or case law making an award or judgment rendered first under Texas law exclusive as to a second award under another state's laws. See 4 A. LARSON, supra; Vestal, Res Judicata/ Claim Preclusion: Judgment for the Claimant, 62 Nw. U.L. Rev. 357, 379 (1967). See also Thibodaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978).

The Magnolia Court relied upon Section 19 of the Texas Act to find the second Louisiana award barred by the prior Texas award. Section 19 prohibits an award of compensation under the Texas Act where an employee has claimed and received compensation under the laws of another state. The Supreme Court in Magnolia obviously interpreted Section 19 as establishing that the converse is true; that an award first under

Texas law prohibits a second award under another state's law. To that extent, the Magnolia Court found the Texas award was exclusive of any subsequent award.

The McCartin decision, however, requires "unmistakable language" establishing that an award under one state's act is intended to be the completely exclusive remedy for an employment-related injury. Surely Section 19 does not contain the required unmistakable language. It does not address the present situation where an award (judgment) is rendered first under the Texas Act and then a supplemental award is sought under another jurisdiction's compensation statute.

Further, no other section of the Texas Act establishes that an award under the Texas Act is the exclusive remedy. An employee who elects to proceed under the Texas Act waives only his "right of action at common law or under any statute of this State." Tex. Rev.

Civ. Stat. Art. 8306, Sec. 3a. He has not waived his rights under any other jurisdiction's legislation by proceeding to a state award or judgment. See Magnolia, supra at 220 (Black, J., dissenting).

Section 3a of the Texas Act is similar to Section 6 of the Illinois Act at issue in McCartin. The discussion above indicates that Section 6 is interpreted to mean that it is the exclusive remedy for an employment injury only in Illinois. Section 3a of the Texas Act has been similarly interpreted where an employee elects to proceed under it. Thus, it is apparent in this case that Texas does not intend its judgment to be exclusive of claimant's other remedies.[2]

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2. One can argue that the written release signed by claimant demonstrates the intent of the parties that the Texas settlement agreement (judgment) was infull satisfaction of all of claimant's rights to compensation for the 1974 heart attack. However, that release agreement was entered into by the parties. It was not incorporated as part of the Texas Court's judgment. Therefore, the release is not binding on us by 28 U.S.C. Sec. 1738.

Finally, Magnolia should not apply in this case where the res judicata effect of the Texas Court's final judgment is unclear. Magnolia involved an award of compensation in Texas which was held to bar a subsequent award in Louisiana. In Texas, the res judicata effect of an award or judgment awarding compensation is statutorily defined. See Tex. Ann. Civ. Art. 8307, Sec. 5.

As noted by the majority, we are not dealing with an award or judgment in the present case. We are dealing with a settlement agreement between the parties which was then issued by the Texas Court as its final judgment. I disagree with the majority's assessment of the res judicata effect of this judgment. It is merely a contract between the parties which, as a matter of procedure, must be approved by either the Texas Industrial Accident Board (the IAB) or the Texas Court before it is binding upon the parties.

It is apparent from the face of the judgment that the Texas Court heard no evidence on the merits of claimant's case. The judgment was merely "a finding by the court against the plaintiff [claimant] as to fraud or equitable grounds for setting aside the compromise settlement agreement." Esco v. Argonaut Insurance Co., 405 S.W.2d 860, 863 (Tex. Civ. App. 1966). None of the issues, either of fact or of law, were stipulated to or adjudicated.

Magnolia hinged on the fact that a final award of compensation under the Texas Act is res judicata in Texas. Therefore, under full faith and credit, the Texas award was res judicata in Louisiana to a further claim for compensation. Magnolia cannot apply to a case where the Texas courts are vague regarding the res judicata effect of the type of judgment issued in claimant's state suit. The Texas courts, as noted by the majority,

state that a court-approved settlement agreement (judgment) "supersedes" the original claim. Does this mean the same thing as "bars," the traditional nomenclature of res judicata? If so, why have the Texas courts chosen such an imprecise term when the exact term could have been used? Further, the only Texas case to hold that an approved settlement agreement actually bars a second claim for additional compensation is a 1929 decision, Lumberman's Reciprocal Association v. Day, 17 S.W.2d (Tex. Comm. App.). Lumberman's has never been cited by a subsequent Texas court for that proposition. Such vagueness in the Texas law cannot be used to extinguish claimant's right to federal relief.

The decision in McCartin, supra, emphasizes this point. McCartin requires "unmistakable language" that an award (judgment) under a state act extinguishes all of the claimant's rights. We have neither an award or judgment

of compensation nor the required unmistakable language. We merely have a pro forma court-approved settlement agreement, the res judicata effect of which is undefined. The requirements of McCartin therefore are not met.

Beyond considerations of McCartin is the special nature of the Federal Act, 33 U.S.C. Sec. 901 et seq. Res judicata and full faith and credit, as codified at 28 U.S.C. Sec. 1738 (1966), have no application in the scheme of the Federal Act until an individual within its coverage has received the complete relief to which the Federal Act entitles him.

The Longshoremen's and Harbor Workers' Compensation Act is remedial legislation enacted by Congress to insure an adequate level of compensation to statutory employees for injuries occurring during the course of their employment. Concerned with the inadequacy of the benefits provided under most

state workmen's compensation laws, Congress amended the Federal Act in 1972 to provide adequate, uniform benefits to employees covered by the Act.[3] Not only does the Act provide the injured employee with adequate

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3. The Report of the Senate Committee on Labor and Public Welfare in its section, "Extension of Coverage to Shoreside Areas," noted that:

> [C]overage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation Laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.
>
> To make matters worse, most State Workmen's Compensation Laws provide benefits which are inadequate . . . S Rep No. 92-1125, 92d Cong. 2d Sess., 12 (1972), reprinted in Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (S. 2318, P.L. 92-576), 92d Cong., 2d Sess., 74 (Dec. 1972).

benefits, it also includes provisions guaranteeing his receipt of those benefits.[4] Section 15(b) of the Federal Act, 33 U.S.C. Sec. 915(b), provides that:

> No agreement by an employee to waive his rights to compensation under this Act shall be valid.

Section 16, 33 U.S.C. Sec. 916, further provides that:

> No assignment, release, or commutation of compensation or benefits due or payable under this Act, shall be valid, and such compensation and benefits shall

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4. The entire framework of the Federal Act is to protect the injured maritime worker. For a critique of the judicial tendency to treat longshoremen as though they are "wards in admiralty," see Norris, The Law of Maritime Personal Injuries, Sec. 6 (3d ed. 1975).

be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.[5]

Finally, a settlement agreement between the interested parties, discharging the liability of the employer for compensation is valid under the Federal Act only when the Deputy Commissioner "determines that it is for the best interests of an injured employee."

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5. Other sections of the Federal Act which insure claimant's benefits include: Section 17 (Compensation award creates a lien on assets of carrier or employer for total amount of award and is entitled to preference and priority upon carrier's or employer's insolvency or bankruptcy); Section 18(b) (In cases of default of payment by reason of employer's insolvency or other circumstances precluding payment, the Secretary of Labor may make payment to a claimant of the Special Fund, as well as provide necessary medical treatment).

Section 8(i)(A), 33 U.S.C. Sec. 908(i)(A).[6]

Thus, permitting the action of the Texas court to abrogate claimant's federal rights plainly violates both the intent and the mandate of Congress. It is especially true in the present case where the state court action was, in reality, no more than a procedural matter. It certainly was not an adjudication on the merits of his state claim. However, even if the state court had issued its judgment after trial, that judgment would not be determinative of claimant's federal claim since the Texas court could not hear or decide claimant's rights under the Federal Act.

Claimant filed a petition with the Texas court for adjudication of his rights, if any, only under Texas law. The Texas Court issued

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6. Case law has held that this power also extends to an administrative law judge. Clefstad v. Perini North River Associates, BRBS, BRB No. 77-583 (Oct. 26, 1978).

a final judgment pursuant to that petition. It did not, and could not, adjudicate claimant's rights under the Federal Act. The power to decide cases under the Federal Act is strictly within the province of the Federal Courts and the administrative bodies empowered by Congress to hear those cases. See 33 U.S.C. Secs. 919, 920 for the adjudicative procedure of the Federal Act.

The practical effect of today's ruling is to hold that a judgment in Texas can nullify a Federal statute which Congress passed for claimant's protection. Quoting Mr. Justice Black in his dissent in Magnolia, "I am not persuaded that the full faith and credit clause gives sanction to such control by one state of the internal affairs of another." 320 U.S. at 455 quoting Yarborough v. Yarborough, 290 U.S. 202, 214 (1933). Because the full faith and credit clause applies to Federal as well as state courts, 28 U.S.C.

Sec. 1738 (1966); Durfee v. Duke, 375 U.S. 106 (1963), what was said by Mr. Justice Black in Magnolia applies equally to the present case.

Further, the policy underlying res judicata is not served by finding that res judicata bars claimant's federal claim. The doctrine of res judicata is based upon the policy of preventing needless or repetitive litigation by effectively coercing the plaintiff to present all his grounds for recovery in the first proceeding. Restatement of Judgments, Sec. 63, Comment A (1942). This policy has no application where a claimant could not have presented all his grounds for recovery in the first proceeding.[7] Because this

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7. Cf. Spence v. Latting, 512 F.2d 93 (10th Cir. 1975), in which a final state judgment, issued after trial, was held res judicata of plaintiff's federal claims under Sec. 1983 of the Civil Rights Act, 42 U.S.C. Sec. 1983. This ruling resulted when the plaintiff was found to deliberately have chosen a state forum which had jurisdiction to redress all his claims, including those under Sec. 1983.

inability to present all claims in one proceeding is inherent in the system, claimant should not be barred from the second proceeding by this action in the first. See Pettus v. American Airline, Inc., No. 77-2230 (4th Cir. Sept. 26, 1978) (dissenting opinion at 18) and Vestal, supra.

Accordingly, I conclude that the analysis used by the majority misconstrues the law concerning res judicata and full faith and credit (28 U.S.C. Sec. 1738) as applied to a claimant under the Federal Act.

II.

Moreover, I believe that the doctrine of res judicata and 28 U.S.C. Sec. 1738 have no validity in a case where the claimant is entitled to compensation under the Federal Act.

Where a state decision on the res judicata effect of its own judgment is involved in a federal action, the federal tribunal is not

necessarily bound by the state decision. "Other well-defined federal policies, statutory or consitutional, may compete with those policies underlying [28 U.S.C. Sec. 1738." American Mannex Corp. v. Rozards, 462 F.2d 688, 690 (5th Cir. 1972). See generally Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1360 (1967).

28 U.S.C. Sec. 1738 is based upon a policy of unifying the Nation's court system. As stated by the Court of Appeals for the Third Circuit:

> The basic goal of full faith and credit is to coordinate the administration of justice throughout the nation. In order to achieve this goal Congress enacted Section 1738 and by use of the words 'State, Territory or Possession' Congress

intended to unify all of the courts in our system of government. Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431, 438 (3d Cir. 1966). However, "where an independent federal interest might support departure from strict adherence to a state rule of [res judicata], a federal question of considerable complexity would be presented." American Mannex Corp. v. Rozards, supra at 690.

I believe the present case presents such a federal question: Is the Longshoremen's and Harborworkers' Compensation Act the exclusive remedy for an injury sustained by a maritime employee working upon the navigable waters? If so, then not only must the state rule of res judicata yield to the superior interest of the federal government, but any action by the state on a maritime employee's compensation claim is void as beyond the state's constitutionally-re-

stricted jurisdiction.

The Federal Act provides the exclusive remedy against employers (insurers) for injuries sustained by an employee working upon the navigable waters, as those terms are defined by the Act. Moragne v. States Marine Lines, 398 U.S. 375 (1970); Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969); Thibodaux v. Atlantic Richfield Co., supra. See also Johnson v. Texas Employers Insurance Association, 558 S.W.2d 47 (Tex.Civ.App. 1977) (dissenting opinion). As stated by the Fifth Circuit Court of Appeals in Thibodaux v. Atlantic Richfield Co.:

> This constitutional grant of jurisdiction has been construed to mean that general maritime law is to be placed under national control in 'its substantive as well as its procedural features...' Pope

[Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953)] We are mindful that there is room for state action in the regulation of maritime commerce, see, Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), and that state created rights may be enforced in a court of admiralty. See Romero v. International Terminal Operating Co., 358 U.S. 354,373, (1959). It is settled, however, that state law must yield to the needs of a uniform federal maritime system when inroads by the state cause disharmony.

580 F.2d at 846-47 (citations omitted).

Consonant with its constitutional authority to pass legislation regulating matters within its exclusive maritime jurisdiction, U.S. Const. Art. 3, Sec.2;

U.S. Const. Art. 1 Sec. 8; Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Southern Pacific v. Jenson, 244 U.S. 205 (1917), the Congress, in 1972, amended the Federal Act. By those amendments, Congress expanded the scope of maritime jurisdiction under the Act. See Sedmak v. Perini North River Associates, BRBS, BRB No. 77-579 & 77-579A (dissenting opinion, Parts IV and V, Jan. 12, 1979) for a discussion of the legal history of the Federal Act and the legislative history of the 1972 Amendments. In reaching this result, Congress not only amended the definition of employee,[8] Sedmak v. Perini

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8. Section 2(3), 33 U.S.C. Sec. 902(3), defines an employee as:

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operation, and any harborworker including a ship

North River Associates, supra at Part IV, it also expanded the definition of navigable waters.

Coverage under the 1927 Federal Act extended only to those employees whose:

> disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

Section 3(a), 33 U.S.C. Sec 903(a) (emphasis added).

Following 1972, the Act was amended to provide coverage to those employees whose:

> repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

> disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 33 U.S.C. Sec. 903(a).

Congress therefore not only deleted any reference to state compensation benefits, but it also expanded, under its constitutionally-delegated powers, the area of federal maritime jurisdiction. Northeast Marine Terminal Co. v. Caputo, supra at Part V. Federal maritime jurisdiction was moved landward to include those areas specifically included in Section 3(a) of the Act, as amended by the 1972 Amendments. See generally LARSON, supra at Sec. 89.70;

Note, Fixing the Landward Coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 36 Md. L. Rev. 851 (1977).

In light of these changes and the legislative history, I conclude that the Congress, through the 1972 Amendments, moved the Jensen line landward to cover maritime employees injured on what was formerly land-based areas. Nacirema Operating Co. v. Johnson, supra. See also Victory Carriers Inc. v. Law, 404 U.S. 202,215 (1971).

Therefore, claimant in the present case cannot have his federal remedy barred by any state proceeding since he clearly is covered by the Federal Act. State law must "yield to the needs of a uniform federal maritime system." Thibodaux, supra.

III.

Turning to the election of remedies argument, it also must fail. By definition,

the doctrine of election of remedies assumes that a choice of remedies is available to an individual. See majority opinion, supra at 13. Because the Federal Act provides the exclusive remedy for an employee within its coverage, this doctrine has no application in the scheme of the Federal Act.

However, even if one were to find that the Federal Act does not provide the exclusive remedy, the election of remedies argument still has no merit. Election of remedies is a strongly criticized doctrine that should not be unduly extended. See, e.g., Brooks v. United States, 337 U.S. 49, 53 (1949); Frederickson v. Renard, 247 U.S. 207 (1921). Given the reluctance of the Supreme Court to allow a statute to cut off an employee's rights under remedial legislation, McCartin, supra, the Board should be even more hesitant to allow a judicially-disfavored equitable doctrine to extinguish a claimant's federal

rights. For that reason alone he should not be held to have made a binding election of remedies. Pierce v. United States, 255 U.S. 398 (1921); Newport News Shipbuilding & Dry Dock Co. v. Director, supra.

The majority argues that claimant, by his active pursuit of his state claim, is barred from relief under the Federal Act. They rely on the 1968 New Jersey Federal District Court decision in Windrem v. Bethlehem Steel Corp., 293 F. Supp. 1 (D.N.J. 1968). arguing that it was decided on its facts. I disagree. Windrem was decided under the pre-1972 Section 3(a) of the Federal Act. That Section, as discussed above, provided for Federal coverage "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." The deletion of this section by the 1972 Amendments, however, withdraws any precedential

value Windrem may have had prior to the Amendments.

The majority also distinguishes the present situation from mere acceptance of state benefits. They find Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962) limited to its facts.[9] Most courts and commentators have not so narrowly construed Calbeck. They interpret it as eliminating any election of remedies problem. See Newport News Shipbuilding & Dry Dock Co. v. Director, supra; Gulf Oil Corp. v. O'Keeffe, 242 F. Supp. 881 (E.D. S.C. 1965); Michigan Mutual Liability Co. v. Arrien, 233 F. Supp. 496 (S.D.N.Y. 1964); LARSON, supra at Sec. 89.53(b).

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9. The majority also cites Holland v. Harrison Brothers Dry Dock & Repair Yard, Inc., 306 F.2d 369 (5th Cir. 1962). Holland, however, relied on Section 3(a) to reach its conclusion. It therefore does not apply to this case.

Further, a consideration of the equities involved in the present case also requires us to allow the present claim under the Federal Act. No doubt it is unfair that employer should be put to the trouble and expense of two law suits when it was employer who, throughout the state court proceedings, insisted that claimant's relief lies solely under the Federal Act. However, the far greater injustice is to claimant who, as a result of his employment-related heart attack, is unable to support himself and his family. He is the one who suffers most if restricted to the settlement of his Texas claim. Any unfairness to the employer is outweighed by the fact that claimant did not receive the full compensation to which he is lawfully entitled. He settled for $20,000.00 when his federal claim could conceivably be worth in excess of $250,000.00.

In fact, claimant actually received only

$14,945.25 of the agreed $20,000.00 settlement. Under Texas law, Art. 8306, Sections 7c & 7d (Supp. 1977), the attorney in a workman's compensation case automatically receives one-quarter of any amount the claimant receives; claimant's attorney received $5,000.00 for his services in the state case. By contrast, attorney's fees under the Federal Act are awarded separately from the claimant's award of compensation, and each attorney's fee must be approved by the tribunal before whom the attorney appeared. See 20 C.F.R. Sec. 702.132 for the numerous criteria that must be satisfied before an award of attorney's fee can be made.

Finally, where, as here, the Board is forced to place injury upon one party or the other, the protective nature of the Federal Act requires us to avoid harm being done to the claimant. See Voris v. Eikel,

346 U.S. 328, 333 (1953).

Accordingly, I would affirm the Decision of the administrative law judge and would permit claimant's action under the Federal Act.

Dated this 6th day
of February, 1979

APPENDIX E

Tex. Rev. Civ. Stat. Ann. (Vernon)
Article 8306, Sec. 3 and 19
Article 8307, Sec. 5

Article 8306. Damages and compensation for personal injuries

* * * *

Exclusiveness of remedy; exemption of compensation from legal process; assignability; recovery from third persons; liability of subscriber

Sec. 3. The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided

for. All compensation allowed urder the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of action and no such compensation and no part thereof or of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void. If an action for damages on account of injury to or death of an employee of a subscriber is brought by such employee, or by the representatives or beneficiaries of such deceased employee, or by the association for the joint use and benefit of itself and such employee or such representatives or beneficiaries, against a person other than the subscriber, as provided in Section 6a, Article 8307, Revised Civil Statutes of Texas, 1925, and if such action results in a judgment against such other person, or results in a settlement by such other person, the subscriber, his

agent, servant or employee, shall have no liability to reimburse or hold such other person harmless on such judgment or settlement, nor shall the subscriber, his agent, servant or employee, have any tort or contract liability for damages to such other person because of such judgment or settlement, in the absence of a written agreement expressly assuming such liability, executed by the subscriber prior to such injury or death. No part of this Section is intended to lessen or alter the employees existing rights or cause of action either against his employer, its subscriber, or any third party.

The association, its agent, servant or employee, shall have no liability with respect to any accident based on the allegation that such accident was caused or could have been prevented by a program, inspection, or other activity or service undertaken by the association for the prevention of accidents

in connection with operations of its subscriber; provided, however, this immunity shall not affect the liability of the association for compensation or as otherwise provided in this law. No part of this Section is intended to lessen or alter the employees existing rights or cause of action either against his employer, its subscriber, or any third party. Acts 1917, p. 269; Acts 1923, p. 385; Acts 1963, 58th Leg., p. 1132, ch. 437, Section 1.

* * * * *

Sec. 19. If an employee, who has been hired in this State, sustain injury in the course of his employment he shall be entitled to compensation according to the Law of this State even though such injury was received outside of the State, and that such employee, though injured out of the State of Texas, shall be entitled to the same rights and

remedies as if injured within the State of Texas, except that in such cases of injury outside of Texas, the suit of either the injured employee or his beneficiaries, or of the Association, to set aside an award of the Industrial Accident Board of Texas, or to enforce it, as mentioned in Article 8307, Sections 5-5a, shall be brought either

a. In the county of Texas where the contract of hiring was made; or

b. In the county of Texas where such employee or his beneficiaries or any of them reside when the suit is brought, or

c. In the county where the employee or the employer resided when the contract of hiring was made, as the one filing such suit may elect.

Providing that such injury shall have occurred within one year from the date such injured employee leaves this State; and provided, further, that no recovery can be

had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the state where such injury occurred. Acts 1917, p. 269; Act 1927, 40th Leg., p. 383, ch. 259; Acts 1931, 42nd Leg., p. 133, ch. 90, Section 1.

* * * * 1977 Amendment * * * *

Sec. 19. If an employee, who has been hired or, if a Texas resident, recruited in this State, sustain injury in the course of his employment he shall be entitled to compensation according to the Law of this State even though such injury was received outside of the State, and that such employee, though injured out of the State of Texas, shall be entitled to the same rights and remedies as if injured within the State of Texas, except that in such cases of injury outside of Texas, the suit of either the injured employee or his beneficiaries, or of

the Association, to set aside an award of the Industrial Accident Board of Texas, or to enforce it, as mentioned in Article 8307, Sections 5-5a, shall be brought either

a. In the county of Texas where the contract of hiring was made or where the employee was recruited; or

b. In the county of Texas where such employee or his beneficiaries or any of them reside when the suit is brought, or

c. In the county where the employee or the employer resided when the contract of hiring was made or when the employee was recruited, as the one filing such suit may elect.

Providing that such injury shall have occurred within one year from the date such injured employee leaves this State; and provided further, that no recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and

recovers in the state where such injury occurred.

Sec. 19 amended by Acts 1977, 65th Leg.,p. 1124, ch. 420, Section 1, eff. June 15, 1977.

Art. 8307, Sec. 5 Determination of questions; suit to set aside final ruling and decision; revocation of association's license

Sec. 5. All questions arising under this law, if not settled by agreement of the parties interested therein and within the provisions of this law, shall, except as otherwise provided, be determined by the Board. Any interested party who is not willing and does not consent to abide by the final ruling and decision of said Board shall, within twenty (20) days after the rendition of said final ruling and decision by said Board, file with said Board notice that he will not abide by said final ruling

and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred to set aside said final ruling and decision, and said Board shall proceed no further toward the adjustment of such claim, other than hereinafter provided. In all cases of occupational diseases, for the purpose of determining venue when an appeal is effected to set aside the final ruling and decision of the Board, suit shall be brought in a court of competent jurisdiction in the said county in which the employee was last exposed to the disease alleged, prior to the manifestation of the disease, or death therefrom, or in the county in which the adverse party resides, or has a permanent place or business, or by agreement of the parties in a court of competent jurisdiction in any county in this state. Whenever such suit is brought, the rights and liability of the parties thereto

shall be determined by the provisions of this law, and the suit of the injured employee shall be against the Association, if the employer of such injured or deceased employee at the time of such injury or death was a subscriber as defined in this law. If the final order of the Board is against the Association, then the Association and not the employer shall bring suit to set aside said final ruling and decision of the Board, if it so desires, and the court shall in either event determine the issues in such cause, instead of the Board, upon trial de novo, and the burden of proof shall be upon the party claiming compensation. The Industrial Accident Board shall furnish any interested party in said claim pending in court, upon request, free of charge, with a certified copy of the notice of the employer becoming a subscriber, filed with the Board, and the same when properly certified to

shall be admissible in evidence in any court in this state upon trial of such claim therein pending, and shall be prima facie proof of all facts stated in such notice in the trial of said cause unless same is denied under oath by the opposing party therein. In case of recovery, the same shall not exceed the maximum compensation allowed under the provisions of this law. If any party to such final ruling and decision of the Board, after having given notice as above provided, fails within said twenty (20) days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto; and, if the same is against the Association, it shall at once comply with such final ruling and decision; and failing to do so, the Board shall certify the fact to the Commissioner of Insurance, and such certificate shall be sufficient

cause to justify said Commissioner to revoke or forfeit the license or permit of such Association to do business in Texas.

Notwithstanding any other provision of this law, as amended, no award of the Board, and no judgment of the court, having jurisdiction of a claim against the association for the cost or expense of items of medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances furnished to an employee under circumstances creating a liability therefor on the part of the association under the provisions of this law, shall include in such award or judgment any cost or expense of any such items not actually furnished to and received by the employee prior to the date of said award or judgment. The first such final award or judgment rendered on such claim shall be res judicata of the liability of the association for all such cost or expense

which could have been claimed up to the date of said award or judgment and of the issue that the injury of said employee is subject to the provisions of this law with respect to such items, but shall not be res judicata of the obligation of the association to furnish or pay for any such items after the date of said award or judgment. After the first such final award or judgment, the Board shall have continuing jurisdiction in the same case to render successive awards to determine the liability of the association for the cost or expense of any such items actually furnished to and received by said employee not more than six (6) months prior to the date of each such successive award, until the association shall have fully discharged its obligation under this law to furnish all such medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances to which

said employee may be entitled; provided, each such successive award of the Board shall be subject to a suit to set aside said award by a court of competent jurisdiction, in the same manner as provided in the case of other awards under this law. Acts 1917, p. 269; Acts 1927, 40th Leg., p. 328, ch. 223, Sec. 1; Acts 1931, 42nd Leg., p. 378, ch. 224, Section 1; Acts 1947, 50th Leg., p. 180, ch. 113, Section 11; Acts 1957, 55th Leg., p. 1186, ch. 397, Section 2.

* * * 1977 Amendment * * *

Sec. 5. All questions arising under this law, if not settled by agreement of the parties interested therein and within the provisions of this law, shall, except as otherwise provided, be determined by the Board. Any interested party who is not willing and does not consent to abide by the

final ruling and decision of said Board shall, within twenty (20) days after the rendition of said final ruling and decision by said Board, file with said Board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred, or in the county where the employee resided at the time the injury occurred (or, if such employee is deceased, then in the county where the employee resided at the time of his death), to set aside said final ruling and decision, and said Board shall proceed no further toward the adjustment of such claim, other than hereinafter provided. In all cases of occupational diseases, for the purpose of determining venue when an appeal is effected to set aside the final ruling and decision of the Board, suit shall be brought in a court of competent jurisdiction

in the said county in which the employee was last exposed to the disease alleged, prior to the manifestation of the disease, or death therefrom, or in the county in which the adverse party resides, or has a permanent place or business, or by agreement of the parties in a court of competent jurisdiction in any county in this state. Whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provisions of this law, and the suit of the injured employee or person suing on account of the death of such employee shall be against the Association, if the employer of such injured or deceased employee at the time of such injury or death was a subscriber as defined in this law. If the final order of the Board is against the Association, then the Association and not the employer shall bring suit to set aside said final ruling and decision of the

Board, if it so desires, and the court shall in either event determine the issues in such cause, instead of the Board, upon trial de novo, and the burden of proof shall be upon the party claiming compensation. The Industrial Accident Board shall furnish any interested party in said claim pending in court, upon request, free of charge, with a certified copy of the notice of the employer becoming a subscriber, filed with the Board, and the same when properly certified to shall be admissible in evidence in any court in this state upon trial of such claim therein pending, and shall be prima facie proof of all facts stated in such notice in the trial of said cause unless same is denied under oath by the opposing party therein. In case of recovery, the same shall not exceed the maximum compensation allowed under the provisions of this law. If any party to such final ruling and decision of the Board, after

having given notice as above provided, fails within said twenty (20) days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto; and, if the same is against the Association, it shall at once comply with such final ruling and decision; and failing to do so, the Board shall certify the fact to the Commissioner of Insurance, and such certificate shall be sufficient cause to justify said Commissioner to revoke or forfeit the license or permit of such Association to do business in Texas.

Notwithstanding any other provision of this law, as amended, no award of the Board, and no judgment of the Court, having jurisdiction of a claim against the association for the cost or expense of items of medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances furnished to an employee under circumstances

creating a liability therefor on the part of the association under the provisions of this law, shall include in such award or judgment any cost or expense of any such items not actually furnished to and received by the employee prior to the date of said award or judgment. The first such final award or judgment rendered on such claim shall be res judicata of the liability of the association for all such cost or expense which could have been claimed up to the date of said award or judgment and of the issue that the injury of said employee is subject to the provisions of this law with respect to such items, but shall not be res judicata of the obligation of the association to furnish or pay for any such items after the date of said award or judgment. After the first such final award or judgment, the Board shall have continuing jurisdiction in the same case to render successive awards to

determine the liability of the association for the cost or expense of any such items actually furnished to and received by said employee not more than six (6) months prior to the date of each such successive award, until the association shall have fully discharged its obligation under this law to furnish all such medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances to which said employee may be entitled; provided, each such successive award of the Board shall be subject to a suit to set aside said award by a court of competent jurisdiction, in the same manner as provided in the case of other awards under this law.

Sec. 5 amended by Acts 1977, 65th Leg., p. 1113, ch. 412, Section 1, eff. Aug. 29, 1977.

Opposition

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No. 81-327

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARLSON MOORING SERVICE AND HOUSTON GENERAL INSURANCE COMPANY, PETITIONERS

v.

WILSON P. LANDRY AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a claimant may receive a supplemental compensation award for an employment-related injury under the Longshoremen's and Harbor Workers' Compensation Act after receiving compensation for the same injury under the Texas workers' compensation statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. AA1-AA32) is reported at 643 F. 2d 1080. The opinion of the Benefits Review Board (Pet. App. AD1-AD62) is reported at 9 B.R.B.S. 518.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1981. A petition for rehearing was denied on May 28, 1981 (Pet. App. AB1-AB3). The petition for a writ of certiorari was filed on August 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Wilson Landry was employed by petitioner Carlson Mooring Service at Port Arthur, Texas (Pet. App. AA2). His job duties consisted of tying up ships as they docked (*id.* at AD2). Landry suffered a heart attack in the course of his employment on February 18, 1974 (*id.* at AA2). He filed claims for compensation for the resulting disability under both the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 (& Supp. III) *et seq.*, and the Texas Workmen's Compensation Law, Tex. Rev. Civ. Stat. Ann. arts. 8306 *et seq.* (Vernon 1967 & Cum. Supp. 1980) (Pet. App. AA2-AA3). Carlson Mooring and its workers' compensation insurer, petitioner Houston General Insurance Co., denied liability under the Texas statute, contending that the LHWCA provided the exclusive remedy for any employment-related injury Landry had sustained (*id.* at AD2). The Texas Industrial Accident Board dismissed Landry's state claim, but the state district court reversed the Industrial Accident Board, holding that Landry could obtain relief under the Texas statute (*id.* at AA3).

Respondent Landry and petitioners entered into a settlement of his Texas compensation claim in June 1975, before the case went to trial (Pet. App. AA3; AD3). As required by Texas law, the parties submitted their settlement to the Texas court for formal entry of judgment. The judgment specified that Landry was to be paid $20,000, of which he received $14,945.25 after deduction of his attorney's fee and costs (*id.* at AA3; AD5). Petitioner Carlson Mooring also accepted liability for Landry's future medical expenses (*id.* at AD3). The judgment recited that the settlement was "in full settlement and satisfaction of all claims and causes of action" arising from Landry's injury (*id.* at AA3). Landry also executed a general release prepared by petitioner Houston General Insurance Co., which stated that it discharged Houston General's liability for all "claims

* * * or kind of action whether at common law or under any statute, state or federal * * * growing out of" Landry's injuries (*id.* at AA4). The release was not incorporated into the state court judgment (*id.* at AD4). After executing the release, Landry withdrew his LHWCA compensation claim (*id.* at AA4).

Thereafter, Landry secured different legal representation and renewed his claim under the LHWCA (Pet. App. AD4). Petitioners denied liability, contending that Landry was barred from pursuing his federal claim by the prior adjudication of his state claim and by the written release he had executed (*id.* at AD5). The administrative law judge found that Landry's claim was within the jurisdiction of the LHWCA and that the prior adjudication of his Texas claim did not preclude Landry from pursuing his claim under the LHWCA. The administrative law judge awarded Landry compensation under the LHWCA for permanent total disability, but credited against that award the net amount of $14,945.25 that Landry had received in settlement of his Texas claim (*ibid.*).

The Benefits Review Board reversed the administrative law judge's decision and set aside the compensation award (Pet. App. AD1-AD28). The Board held that the Full Faith and Credit Clause of the Constitution (Article IV, Section 1) and the doctrine of election of remedies barred Landry from pursuing his compensation claim under the LHWCA following the final adjudication of his Texas claim. Member Miller dissented (*id.* at AD28-AD62).

Respondents petitioned for judicial review, and the court of appeals reversed the Board's decision (Pet. App. AA1-AA32). After examining this Court's intervening decision in *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261 (1980), the court held that Texas law does not preclude a claimant from obtaining further relief under the LHWCA after receiving a compensation award under the Texas

workers' compensation statute (Pet. App. AA6-AA27). The court noted (*id.* at AA15) that the plurality opinion in *Thomas* stated that the "Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards." See 448 U.S. at 286 (opinion of Stevens, J.). Because there was no opinion for the Court in *Thomas*, however, the court of appeals concluded that it was required to reach its decision "on the more limited ground provided by the concurring justices" (Pet. App. AA17), who followed the rule established by two earlier decisions of this Court, *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), and *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947). See 448 U.S. at 286-290 (White, J., concurring).

In *Magnolia*, as the court of appeals explained (Pet. App. AA8-AA12), this Court held that the Full Faith and Credit doctrine barred a claimant from receiving a compensation award in Louisiana after receiving an award for the same injury under the Texas workers' compensation statute. Four years later in *McCartin*, the Court narrowed the impact of *Magnolia* by specifying that a state workers' compensation law would be construed as barring further recovery in another jurisdiction only when the state law contained "unmistakable language" making clear its preclusive intent. See Pet. App. AA12-AA14; 330 U.S. at 627-628. Accordingly, the Court in *McCartin* permitted a claimant to obtain a supplemental recovery under Wisconsin law although he had already been awarded compensation under an Illinois statute. Analyzing the Texas statute in accordance with the rule of *Magnolia* and *McCartin*, the court of appeals concluded that none of the three provisions relied on by petitioners constituted "unmistakable language" indicating an intent to preclude a supplemental recovery in another jurisdiction (Pet. App. AA18-AA26).

The court of appeals also rejected petitioners' contention that, under the doctrine of election of remedies, respondent Landry was limited to his state remedy, holding that the remedies under a state statute and the LHWCA are not mutually exclusive (Pet. App. AA27-AA30). The court further held that the administrative law judge correctly had credited against Landry's federal compensation award only Landry's net recovery on his Texas claim rather than including the sum paid for attorney's fees and costs (*id.* at AA30-AA32).

ARGUMENT

1.a. Petitioner contends (Pet. 6-15) that the court of appeals erred in holding that the Texas statute lacks the "unmistakable language" required by *Industrial Commission* v. *McCartin, supra,* to preclude a supplemental workers' compensation recovery in a second jurisdiction. This contention is without merit. The court of appeals' decision correctly interpreted the Texas statute in accordance with the dictates of this Court's decisions in *Thomas* v. *Washington Gas Light Co., supra,* and *McCartin.*

Petitioners do not seriously contend that the language of the Texas statute is significantly different from that of the Illinois statute considered by this Court in *McCartin* or the Virginia statute considered in *Thomas.* As the court of appeals explained in detail (Pet. App. AA20-AA26), it is clear that the Texas statute contains no provision that unmistakably manifests an intent to preclude a supplemental workers' compensation remedy in another jurisdiction.[1] Rather, petitioners' primary contention is that the Texas

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[1]As the plurality opinion in *Thomas* pointed out (448 U.S. at 275 n.21), Nevada law appears to contain the "unmistakable language" required by *McCartin* that indicates an intent to preclude a supplemental recovery under the law of another state. See Nev. Rev. Stat. § 616.525 (1979).

statute must be construed to prohibit a supplemental award because *Magnolia Petroleum Co.* v. *Hunt, supra,* also involved the Texas statute, which has not been amended significantly in the intervening years. But this contention overlooks the fact that the Court in *Magnolia* did not apply the "unmistakable language" analysis subsequently announced in *McCartin,* which substantially narrowed the precedential effect of *Magnolia.* Accordingly, *Magnolia* cannot be considered as a precedent regarding the preclusive effect of Texas law today, and the court of appeals was correct to analyze the statute under the test enunciated by the Court in *McCartin* and followed by the concurring opinion in *Thomas.* The approach of the court of appeals is in accord with recent decisions of other courts faced with the task of construing the Texas statute in light of *Magnolia* and *McCartin.* The Louisiana courts have permitted a claimant to receive a supplemental award even though he had already received an award in Texas. *Griffin* v. *Universal Underwriters Insurance Co.,* 283 So.2d 748 (La. 1973), cert. denied, 416 U.S. 904 (1974). And the Texas courts have indicated that a Texas workers' compensation award does not bar a supplemental recovery under the LHWCA. *Johnson* v. *Texas Employers Insurance Association,* 558 S.W.2d 47, 52 (Tex. Civ. App. 1977). In any event, because petitioners' contention is solely concerned with the proper interpretation of Texas law, it presents no issue that warrants review by this Court.

b. Moreover, even assuming that the Texas statute does bar a supplemental award under the workers' compensation statute of another state, it does not bar a supplemental award under the federal statute.[2] In 1972, Congress extended the coverage of the LHWCA to land-based injuries also

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[2]The court of appeals found it unnecessary to reach this issue (Pet. App. AA10).

covered by state compensation laws in order to supplement state law benefits that were deemed to be inadequate. See *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 723-724 & n.5 (1980). This Court held in *Sun Ship* that the jurisdiction of the LHWCA as extended in 1972 does not preempt the operation of state compensation statutes; it "supplements, rather than supplants, state compensation law." 447 U.S. at 720.

The Court explained that this scheme of concurrent jurisdiction of federal and state statutes ordinarily would not endanger the overriding federal policy underlying the 1972 amendments of "raising awards to a federal minimum." 447 U.S. at 723-724. Even if claimants initially seek state compensation relief, they "will generally be able to make up the difference between state and federal benefit levels by seeking relief under the Longshoremen's Act, if the latter applies." *Id.* at 724. The Court in *Sun Ship* recognized in dictum, however, that there was one instance in which a conflict between state law and the LHWCA could arise—where "a particular state compensation law provision does indisputably declare its awards final [and] a claimant seeks inferior state benefits in the first instance." *Id.* at 724 n.6. If such a case were to arise, the Court explained, the paramount federal interest in providing LHWCA benefits to eligible employees would preempt the state statute to the extent that it purported to exclude a supplemental LHWCA remedy. *Ibid.* Thus, even if petitioners are correct that the Texas statute bars a claimant from recovering a supplemental award under the workers' compensation statute of another state, it cannot bar the recovery of a supplemental award under the LHWCA.[3]

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[3] In its amicus curiae brief in *Sun Ship*, the government referred to the instant case, given the interpretation of the Texas statute urged by petitioners and adopted by the Benefits Review Board, as an example where a state workers' compensation law could conflict with the LHWCA. U.S. Br. (No. 79-343, 1979 Term) at 26-27 n.16.

2.a. Petitioners' other contentions are insubstantial. There is no basis for equitable estoppel of Landry's LHWCA claims (see Pet. 15-17). Petitioners have always known that they were subject to liability under the LHWCA, and they have not been prejudiced in the federal proceeding by the fact that Landry first sought relief under state law. Petitioners' contention essentially is that Landry should be bound by the terms of the release he signed. See Pet. 17. But, as the court of appeals pointed out (Pet. App. AA27), the LHWCA specifically provides that such a release is ineffective to bar a claim under the LHWCA. 33 U.S.C. 915(b).

b. Petitioner also contends (Pet. 18-29) that the court of appeals erred because it applied *Thomas* retroactively. The short answer to this contention is that the court of appeals did not apply *Thomas* retroactively. Rather, it based its decision on the concurring opinion in *Thomas*, which expressly followed the existing law as set forth in *McCartin* and *Magnolia*. See 448 U.S. at 289-290 (White, J., concurring). Thus, the court of appeals' decision is not based on any "new rule of law" for which retroactive application is even an issue. Indeed, as noted earlier (page 6, *supra*), state courts had held prior to *Thomas* that the Texas statute has no preclusive effect on workers' compensation awards in other jurisdictions. See *Johnson* v. *Texas Employers Insurance Association, supra; Griffin* v. *Universal Underwriters Insurance Co., supra.*[4]

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[4]Petitioners' reliance on *Shea* v. *Texas Employers' Insurance Association*, 383 F. 2d 16 (5th Cir. 1967), is misplaced. Although the court of appeals there held that state law and the LHWCA were mutually exclusive, its decision rested solely on the state law limitation in the LHWCA that was eliminated in 1972. See 383 F. 2d at 18-19; see also *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 720-721.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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